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SENTENCING COMMISSION GUIDELINES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

GUIDELINES DRAFTED BY THE U.S. SENTENCING COMMISSION

OCTOBER 22, 1987

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SENTENCING COMMISSION GUIDELINES

THURSDAY, OCTOBER 22, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee convened, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy (acting chairman) presiding.

Also present: Senators DeConcini, Metzenbaum, Thurmond, Grassley, Simpson and Specter.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator Kennedy. We will come to order.

The chairman of our committee is necessarily absent because he is on the Senate floor at the present time for the consideration of the Associate Justice to the Supreme Court.

Three years ago, one of the most important and needed criminal justice reforms in modern American history became law. The purpose of the Sentencing Reform Act of 1984 was straightforward: to reduce the unjustified disparity in sentences that had long plagued our Federal criminal justice system.

The landmark changes brought about by the Sentencing Reform Act were the result of a comprehensive bipartisan effort. After extensive hearings and debate in the 1970's, and early 1980's, the Act finally became law as part of the Comprehensive Crime Control Act of 1984.

Throughout this lengthy period of congressional review, a period of some 14 years, scores of witnesses with widely differing philosophies presented a deeply troubling analysis of sentencing under current law. They showed that the present system is irrational, unpredictable and unfair.

Numerous studies were reviewed during this period that confirmed this devastating picture. To cite just one example, judges from the Second Circuit were asked to determine sentences based on identical presentation reports. The sentences they recommended in one extortion case ranged from 3 years and no fine to 20 years and a $65,000 fine.

Other studies showed that disparities among individual judges are further compounded by regional differences. In Florida, for example, forgery is sentenced harshly, but in the Northern District of New York, it receives only about one-fifth the amount of prison time.

When parole is considered, under which some defendants serve all of their sentence, and others only one-third, the problem is complete—a chaotic system that is not fair to victims, not fair to offenders, and that breeds disrespect for the law.

As Second Circuit Judge Jon Newman observed in 1977, the root of the problem is that "sentencing is the one function given to judges on which there is, for all practical purposes, no law."

The Sentencing Reform Act provided a comprehensive solution to this problem. The cornerstone of the Act was the creation of a Sentencing Commission whose members the President appointed in 1985.

The Commission's mandate is to develop guidelines that will channel the previously unfettered sentencing discretion of judges into a system of sentencing that is coherent and fair.

The Act furthers this "truth in sentencing" approach by abolishing parole, so that the sentence given is the sentence served. Judges need not follow the Commission's guidelines if there are sound reasons for departure, but if they do not follow the guidelines, their reasons must be stated on the record, and, for the first time under Federal law, sentences are subject to appeal.

Congress understood that a comprehensive system of guidelines would inevitably require refinement as time goes on. The Commission is a permanent body and will continue to monitor the guidelines to see where adjustments may be needed.

The sentencing decisions of judges, both following the guidelines and departing from them, provide the record for the Commission's review.

On April 13th of this year, the Commission submitted detailed sentencing guidelines to Congress which will become law on November 1st. These guidelines are an excellent starting point and establish a structure for judges which is flexible enough to assure fairness and simple enough to preclude endless procedural delays.

Over the summer, the House of Representatives held hearings on whether implementation of the guidelines should be delayed. I followed those hearings closely. Also during this period, Committee staff met with both the proponents and opponents of delay, and discussed with others several legislative proposals to further refine and improve the enabling legislation.

Two weeks ago, by a decisive vote, the House rejected a bill that would have delayed the guidelines' implementation.

With recent events in mind, this hearing was scheduled to provide the Senate with a progress report on the work to date, and now, perhaps more importantly, a road map for the days and months ahead.

Let me say what a pleasure it is to be with the former Chairman of the Judiciary Committee and the Ranking Minority Member of the full committee with whom I enjoyed working so closely on the legislation, with the Chairman, Senator Biden, and other Members of the committee, in helping to fashion the legislation and in following the development of this Commission. It is a real pleasure to join with Senator Thurmond here this morning.

Senator THURMOND. Thank you very much, Mr. Chairman, and I want to commend you for all the good work you have done on this subject.

I am pleased to be here today for this Judiciary Committee hearing on the sentencing guidelines which were submitted to Congress for review on April 13, 1987. These guidelines will take effect on November 1, 1987.

Regarding the history of the sentencing guidelines, in 1984, I worked with Chairman Biden, Senator Kennedy, Senator Hatch, and other colleagues on the committee, and in the Senate, to formulate the Comprehensive Crime Control Act of 1984.

This Act included many needed reforms in our criminal law. One of these reforms dealt with sentencing procedures and policy. More specifically, Congress focused on two major points: first, the disparity in sentences imposed on individuals convicted of similar crimes, and, second, actual time served by those convicted of crimes, which was often much less than the sentence imposed.

These issues had been the subject of extensive hearings prior to 1984, and were further examined when the Crime Control Act was formulated by the Judiciary Committee.

As a result of concern about these issues, Congress included a title in the 1984 Act known as the Sentencing Reform Act. This Act established the Sentencing Commission for the purpose of formulating guidelines to be used by judges in the sentencing process, and abolishes parole in the Federal system.

Under the system established by the 1984 Act, people convicted of similar crimes will serve similar sentences, and the sentences imposed will reflect the actual time that must be served.

Over the past few years, the members of the Sentencing Commission have been working diligently under the leadership of its able Chairman, Judge William W. Wilkins, Jr., to formulate these guidelines.

I highly commend Chairman Wilkins and the other distinguished members of the Sentencing Commission for the tireless effort they have put into this task. I look forward to hearing their testimony today.

Regarding a delay in the implementation of these guidelines, I believe that issue has been decided. As there will be no delay, it is now our responsibility to consider any changes to the Sentencing Reform Act that may be necessary in order to ensure the orderly implementation of the guidelines on November 1, 1987.

In closing, I am pleased with the final product that the Commission has produced. While I realize that the guidelines may not be perfect, it is a vast improvement over the current sentencing process.

I believe this system will provide uniformity in sentencing as well as assure that sentences will be served in their entirety. This is a big step indeed.

Finally, we must remember that the guidelines are not carved in stone. The 1984 Act specifically provides for an amendment process, so that as the sentencing guidelines are applied in the courtroom, any necessary refinements can be made.

I look forward to hearing the testimony of the witnesses present today, and thank you, Mr. Chairman. It has been a pleasure to work with you on this matter.

[The statements of Senators DeConcini and Grassley follow:]

STATEMENT OF SENATOR DECONCINI BEFORE THE JUDICIARY COMMITTEE REGARDING THE SENTENCING COMMISSION GUIDELINES.

MR. CHAIRMAN, I WOULD LIKE TO THANK YOU FOR SCHEDULING THIS HEARING TODAY TO CONSIDER THE SENTENCING GUIDELINES WHICH WILL BE IMPLEMENTED AS OF NOVEMBER 1 OF THIS YEAR.

I AM, HOWEVER, A LITTLE EMBARRASSED AND SOMEWHAT DISENCHANTED BY THE LATENESS OF THIS HEARING. AS WE ARE ALL AWARE, THE GUIDELINES AS THEY NOW STAND WILL AUTOMATICALLY BECOME EFFECTIVE IN ELEVEN CALENDAR DAYS. LESS THAN TWO WEEKS. THIS PROVIDES MINIMAL TIME FOR REVIEW OF THE GUIDELINES BY THIS BODY PRIOR TO THEIR IMPLEMENTATION. NOW I WILL NOT SIT HERE AND CLAIM THAT THE COMMITTEE DID NOT HAVE OTHER MATTERS TO ATTEND TO DURING THE LAST SIX MONTHS SINCE RECEIVING THE FIRST DRAFT OF THE GUIDELINES. BUT EVEN IN LIGHT OF THE BORK NOMINATION AND OTHER LEGISLATION, I FEEL THESE GUIDELINES ARE OF SUCH IMPORTANCE THERE SHOULD HAVE BEEN SOME SORT OF CONSIDERATION OF THEM BEFORE THIS LATE DATE.

IN EARLY SEPTEMBER, SEPTEMBER 10 TO BE EXACT, I INTRODUCED A BILL WHICH WOULD HAVE DELAYED THE IMPLEMENTATION OF THE GUIDELINES FOR ONE YEAR WHILE AT THE SAME TIME WOULD HAVE ADOPTED THE GUIDELINES TO INSURE THAT THEY WERE NOT ALLOWED TO DIE A SLOW

DEATH BY THOSE OPPOSED TO GUIDELINES IN GENERAL. FOLLOWING THE RECENT DEVELOPMENTS IN THE HOUSE, IT DOES NOT APPEAR THAT ANY FORM OF DELAY LEGISLATION WILL BE PASSED. EVEN SO, I BELIEVE THAT THE QUESTION OF DELAY MAY WARRANT SOME DISCUSSION. IT IS ALSO MY UNDERSTANDING THAT ONE OR MORE OF TODAY'S WITNESSES MAY BE INCLINED TO OFFER AN OPINION ON DELAY. IF THAT IS THE CASE, I WOULD CERTAINLY WELCOME SUCH A DISCUSSION.

MR. CHAIRMAN, I DO NOT WANT TO GIVE THE WRONG IMPRESSION CONCERNING THE GUIDELINES. I AM IN SUPPORT OF THE GUIDELINES AND DO NOT OPPOSE THEIR ADOPTION. UNDER CURRENT SENTENCING PROCEDURES SIMILAR CRIMES COMMITTED IN DIFFERENT FEDERAL DISTRICT CAN RESULT IN TREMENDOUSLY DISSIMILAR SENTENCES. EVEN WHEN CRIMES ARE COMMITTED IN THE SAME STATE THERE ARE TIMES WHEN THE SAME CRIMINAL ACT RESULTS IN EXCEEDINGLY DIFFERENT SENTENCES. AS AN EXAMPLE I CITE MY OWN STATE OF ARIZONA. IN CONSIDERING CRIMES COMMITTED ON INDIAN RESERVATIONS IN MY HOME STATE, I HAVE FOUND THAT THERE IS A MOST UNCONSCIONABLE DISPARITY BETWEEN THE AVERAGE NUMBER OF MONTHS SERVED FOR CRIMES COMMITTED AGAINST NON-INDIAN VICTIMS AND SENTENCES SERVED FOR CRIMES AGAINST INDIAN VICTIMS. THE AVERAGE TIME SERVED FOR COMMITTING A HOMICIDE AGAINST A NON-INDIAN IS 147 MONTHS COMPARED TO 48.95 MONTHS SERVED FOR HOMICIDE AGAINST AN INDIAN. THE STATISTICS ARE SIMILAR FOR 2ND DEGREE MURDER, AGGRAVATED ASSAULT, SEXUAL ASSAULT, OTHER SEX CRIMES AND BURGLARY. CLEARLY, THIS DISPARITY CAN NOT CONTINUE.

MR. CHAIRMAN, MANY HUNDREDS OF HOURS HAVE BEEN DEVOTED TO CREATING THESE GUIDELINES. IT WOULD BE UNTHINKABLE TO MERELY RUBBERSTAMP THE PRODUCT OF SUCH AN EXTENDED EFFORT WITHOUT FIRST CONSIDERING THE INTRICACIES AND IMPLICATIONS OF THE GUIDELINES. TO DO ANYTHING LESS WOULD BE DISRESPECTFUL TO THOSE WHO HAVE GIVEN SO MUCH TO THIS MASSIVE UNDERTAKING, AND WOULD SHIRK OUR OWN RESPONSIBILITIES AS U.S. SENATORS.

UNDOUBTEDLY, AS WILL BE THE CASE WITH ANY PROJECT OF THIS MAGNITUDE, THE GUIDELINES WILL RECEIVE CRITICISM. I BELIEVE THAT AFTER THE CRITICS HAVE HAD THEIR SAY, THE GUIDELINES WILL REMAIN THE BEST VIABLE ANSWER TO ACHIEVING THE GOALS SET FORTH BY THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, ie. DETERRING CRIME, INCAPACITATING THE OFFENDER, PROVIDING JUST PUNISHMENT, AND REHABILITATING THE OFFENDER. IN ADDITION THE GUIDELINES WILL ACHIEVE THESE GOALS WHILE INSURING UNIFORMITY, HONESTY AND PROPORTIONALITY IN SENTENCING.

MR. CHAIRMAN, I THANK YOU FOR THE OPPORTUNITY TO DISCUSS THE GUIDELINES AT THIS FORUM. I ONLY HOPE THAT IT IS NOT TOO LATE TO OFFER OUR ASSISTANCE IF NEEDED.

STATEMENT OF SEN. CHARLES E. GRASSLEY
ON THE GUIDELINES ESTABLISHED BY THE
U.S. SENTENCING COMMISSION
SENATE JUDICIARY COMMITTEE HEARING
OCTOBER 22, 1987

MR. CHAIRMAN, I WANT TO THANK YOU FOR HOLDING THIS COMMITTEE HEARING REGARDING THE IMPLEMENTATION OF THE U.S. SENTENCING COMMISSION'S SENTENCING GUIDELINES FOR USE IN FEDERAL CRIMINAL SENTENCING PROCEEDINGS. THIS HEARING IS OCCURING AT A TIME WHEN THE GUIDELINES, UNLESS THE CONGRESS ACTS TO DELAY, WILL SOON BE USED BY FEDERAL TRIAL COURT JUDGES IN SENTENCING THOSE CONVICTED OF CRIMES IN FEDERAL COURT.

CONGRESS CREATED THE U.S.SENTENCING COMMISSION AS A PART OF THE CRIME CONTROL ACT OF 1984 TO OVERHAUL THE FEDERAL SENTENCING SYSTEM. THE COMMISSION IS AN INDEPENDENT BODY WITHIN THE JUDICIAL BRANCH OF GOVERNMENT, COMPOSED OF SEVEN VOTING AND TWO NON-VOTING MEMBERS, WHO ARE APPOINTED BY THE PRESIDENT AND CONFIRMED BY THE SENATE.

THE COMMISSION WAS CHARGED WITH FORMULATING SENTENCING POLICIES AND PRACTICES FOR THE FEDERAL CRIMINAL JUSTICE SYSTEM. THESE POLICIES AND PRACTICES ARE TO FULFILL THE PURPOSES AND GOALS OF SENTENCING--PUNISHMENT, DETERRENCE, INCAPACITATION, AND REHABILITATION.

THE COMMISSION WAS DIRECTED TO PRODUCE GUIDELINES THAT WOULD AVOID UNWARRANTED SENTENCING DISPARITIES AMONG THE VARIOUS FEDERAL DISTRICT COURTS. CONGRESS DETERMINED THAT _CERTAINTY_, _UNIFORMITY_, AND _CONSISTANTCY_ IN THE SENTENCING PROCESS WOULD BE CRUCIAL ASSETS IN FULFILLING THE PURPOSES AND GOALS OF SENTENCING, REFERRED TO ABOVE.

AT THE SAME TIME, CONGRESS WAS REALISTIC ENOUGH TO MAINTAIN SUFFICIENT FLEXIBILITY FOR FEDERAL TRIAL COURT JUDGES BY ALLOWING THEM TO GIVE SPECIAL ATTENTION TO THOSE CASES THAT DO NOT FIT IN ANY WAY INTO THE GUIDELINES, ESPECIALLY WHEN TAKING INTO ACCOUNT MITIGATING OR AGGRAVATING CIRCUMSTANCES.

THE COMMISSION BEGAN ITS WORK IN 1985 AND SUBMITTED ITS WORK PRODUCT TO THE CONGRESS IN APRIL OF THIS YEAR. THEIR WORK IS THE RESULT OF OVER A DECADE-LONG EFFORT BY THOSE, BOTH IN AND OUT OF THE CONGRESS, WHO HAVE SOUGHT TO BRING A BIT OF COMMON SENSE TO THE PROCESS OF SENTENCING THOSE WHO HAVE BEEN CONVICTED OF CRIMES IN OUR FEDERAL COURTS.

TOADY, WE SHALL CONSIDER THE POSSIBLE NEGATIVE CONSEQUENCES IN THE IMPLEMENTATION OF THESE PENDING GUIDELINES. I AM VERY MUCH INTERESTED IN HEARING OF THESE POTENTIAL CONSEQUENCES, AND WHAT WE MIGHT DO TO MINIMIZE THEM.

SOME HAVE ARGUED THAT THE GUIDELINES SHOULD BE DELAYED BECAUSE THERE HAS BEEN AN INSUFFICIENT TIME WITHIN WHICH TO TRAIN THOSE WHO WILL BE ADMINISTERING THIS NEW PROCEDURE. THE PROPONENTS OF DELAY ALSO CONTEND THAT THE GUIDELINES ARE TOO COMPLEX TO BE IMPLEMENTED IN A MANNER CONSISTENT WITH THE INTENT OF THE CONGRESS.

THIS ARGUMENT HAS BEEN COUNTERED BY THOSE WHO MAINTAIN THAT THE GUIDELINES WERE PROMULGATED IN APRIL, 1987, GIVING A SUFFICIENT PERIOD OF TIME WITHIN WHICH TO ADEQUATELY AQUAINT EVERYONE INVOLVED IN THE SENTENCING PROCESS WITH THE GUIDELINES. THOSE AGAINST DELAY ALSO CONTEND THAT THE GUIDELINES ARE STRAIGHT-FORWARD AND DO NOT REQUIRE ANY ELABORATE RE-EDUCATION EFFORT.

ANOTHER ARGUMENT MADE BY THE PROPENTS OF DELAY STATES THAT THE GUIDELINES HAVE NOT BEEN PERFECTED YET, AND THAT ANY SUCH GUIDELINES SHOULD NOT BE IMPLEMENTED UNTIL THEY ARE "PERFECTED". OPPONENTS OF DELAY MAINTAIN THAT THE GUIDELINES AUTHORIZES FEDERAL JUDGES TO SENTENCE OUTSIDE THE GUIDELINES IF IT IS NECESSARY, AS LONG AS THE JUDGE SETS FORTH THE REASONING FOR DEPARTING FROM THE GUIDELINES--AND UNDERSTANDS THAT ANY SENTENCES OUTSIDE THE GUIDELINES ARE SUBJECT TO APPEAL.

FINALLY, PROPONENTS OF DELAY ALSO CONTEND THAT IMPLEMENTATION OF THE GUIDELINES WILL REDUCE THE LENGTH OF SENTENCES HANDED DOWN IN FEDERAL COURTS BECAUSE THEY WILL PREVENT FEDERAL JUDGES FROM IMPOSING STRONG SENTENCES. OPPONENTS OF DELAY POINT OUT THAT PRESENT SENTENCES HANDED DOWN BY FEDERAL JUDGES ARE USUALLY REDUCED BY THE U.S. PAROLE COMMISSION. THESE ADVOCATES OF GOING AHEAD WITH IMPLEMENTATION MAINTAIN THAT THE REAL NEED IN THE AREA OF SENTENCING LENGTH IS TO ATTACK UNDULY LENIENT SENTENCES, AND THEY BELIEVE THAT THE GUIDELINES WOULD ADDRESS THIS PROBLEM.

HOWEVER, WITH THE RECENT REJECTION BY THE HOUSE OF A BILL TO DELAY THE IMPLEMENTATION OF THE GUIDELINES, ANY DISCUSSION OF DELAY, IS FOR ALL PRACTICLE PURPOSES, MOOT. AT THIS STAGE OF THE PROCEEDINGS, WE SHOULD LOOK AHEAD TO HOW WE CAN BEST ENSURE THAT THE GUIDELINES ARE IMPLEMENTED AS THE CONGRESS INTENDED, WHILE CAUSING THE LEAST DISRUPTION POSSIBLE TO OUR FEDERAL CRIMINAL JUSTICE SYSTEM.

MR. CHAIRMAN, I BELIEVE THAT THE AMERICAN PEOPLE WANT TO HAVE A CRIMINAL JUSTICE SYSTEM, AT THE FEDERAL LEVEL OF GOVERNMENT, THAT INSURES THAT THE GUILTY ARE PUNISHED FOR WRONGS COMMITTED AGAINST SOCIETY. I BELIEVE THAT THE AMERICAN PEOPLE ARE FAIR, BECAUSE THEY HAVE A DESIRE TO GIVE INDIVIDUALS CONVICTED OF CRIMES ANOTHER CHANCE TO BECOME CONTRIBUTING MEMBERS OF OUR SOCIETY.

HOWEVER, I BELIEVE THE AMERICAN PEOPLE ARE ALSO PRACTICAL; THEY DO NOT LIVE IN SOME IDEAL WORLD. THE AMERICAN PEOPLE KNOW THAT SOME INDIVIDUALS CANNOT BE REHABILITATED, IN SPITE OF THE BEST EFFORTS AND INTENTIONS OF SOCIETY. THESE CRIMINALS MUST BE SEPARATED FROM DECENT CITIZENS AND TREATED AS THE OUTCASTS THEY HAVE MADE OF THEMSELVES.

I BELIEVE THE AMERICAN PEOPLE WANT A SYSTEM OF SENTENCING THOSE WHO ARE GUILTY OF COMMITTING CRIMES THAT INSURES THAT SIMILAR CRIMES ARE GIVEN SIMILAR SENTENCES BY OUR FEDERAL TRIAL COURT JUDGES. IN ADDITION, I BELIEVE THE AMERICAN PEOPLE WANT A SYSTEM THAT MAY AFFORD A MEASURE OF DETERRANCE TO THOSE WHO MAY BE CONTEMPLATING CRIMES. I ALSO BELIEVE THAT THE AMERICAN PEOPLE WOULD LIKE A CRIMINAL SENTENCING SYSTEM THAT ALLOWS AN INDIVIDUAL A SECOND CHANCE TO "STRAIGHTEN UP" THROUGH THE POSSIBILITY OF REHABILITATION.

HOWEVER, I BELIEVE THE AMERICAN PEOPLE ARE DEMANDING A CRIMINAL SENTENCING SYSTEM THAT SWIFTLY AND SURELY PUNISHES THOSE WHO HAVE DECIDED, FOR REASONS OF THEIR OWN, TO LIVE OUTSIDE THE BOUNDS OF SOCIETY'S LAWS. THIS WORST-CASE EXAMPLE IN THE SENTENCING PROCESS MUST NOT BE SACRIFICED UPON THE ALTERS OF DETERRANCE OR REHABILITATION.

THE AMERICAN PEOPLE ARE DEMANDING THAT THE CRIMINAL SENTENCES HANDED DOWN BY OUR FEDERAL COURTS BE RATIONAL, PREDICTABLE, PRINCIPLED, AND FAIR. THOSE OF US ELECTED TO REPRESENT THE AMERICAN PEOPLE MUST ENSURE THAT SUCH A SYSTEM IS IN PLACE.

MR. CHAIRMAN, I LOOK FORWARD TO THE TESTIMONY OF OUR WITNESSES TO ASSIST THE COMMITTEE IN ITS DELIBERATIONS ON THIS IMPORTANT ISSUE. THANK YOU.

Senator **Kennedy**. Thank you, Senator Thurmond.

Our first witnesses are the distinguished members of the United States Sentencing Commission. With us today are: William W. Wilkins, Jr., Chairman of the Commission, and Federal Judge in the U.S. Court of Appeals for the Fourth Circuit; Michael K. Block, professor of law and associate professor of economics and policy at the University of Arizona; Stephen G. Breyer, a Federal Judge in the First Circuit Court of Appeals; Helen G. Corrothers, former United States Parole Commission member, and prison warden in Arkansas Department of Corrections; George E. MacKinnon, Senior Judge, U.S. Circuit for the District of Columbia; and Ilene H. Nagel, professor of law, Indiana University.

If you will be kind enough to come forward, please. I understand that Chairman Wilkins and Commissioner Breyer will present the Commission's testimony. Other members of the Commission are prepared to answer any questions from the committee.

Before you begin, Judge Wilkins, I want to congratulate you and all the members of the Commission for the outstanding work. The Sentencing Reform Act was adopted with overwhelming bipartisan support. I think you followed in the same spirit by working together to produce guidelines that have gathered the same kind of broad support.

As I remember, we passed that bill five times in the Senate before we were able to get our good friends over in the House to move towards it, and I think there was only one Member of our Judiciary Committee that dissented, and if my memory serves me correctly, I think there were only three Members on the Senate Floor.

It is extremely rare that you get matters of significance and substance with that kind of broad support and it is, I think, a keen indication of the desire to achieve the Act's goals, and we realized that the key element in being able to achieve that expression of the Congress rested with the Commission.

We are generalists here. We do not have the kinds of expertise that you and the members of your Commission have, so we were really in your hands, in terms of carrying forward that very, very significant and important congressional mandate, and I must say I think that you have demonstrated that same desire of consensus within the Commission, which I think inspires the confidence of the Congress, the Senate, and most importantly, of the American people. That is what we are really talking about here, and, if done well, it will be the example, hopefully, perhaps, for States to follow.

But it has been that kind of a similar consensus that has been built in this panel, with some very differing views about the subject matters, and we grant that, but I think it is really something of great significance and importance, and I am sure that it was through your leadership, Judge Wilkins, and we want to all recognize that, and thank the members of the panel for taking that spirit of comity and accommodation which was reflected in the fashioning of the legislation and used it in the Commission itself. It is a real tribute, I think.

Would you begin.

STATEMENTS OF A PANEL CONSISTING OF THE UNITED STATES SENTENCING COMMISSION: HON. WILLIAM W. WILKINS, JR., HON. STEPHEN G. BREYER, HON. GEORGE E. MacKINNON, MICHAEL K. BLOCK, HELEN G. CORROTHERS, AND ILENE H. NAGEL

Judge WILKINS. Thank you, Mr. Chairman. Judge Breyer and I have a few remarks to make on behalf of the Commission, as you mentioned, and then all Commissioners will be available for any questions that you or others may have.

I will say, from the beginning—and I know that I speak for all of the Commissioners here—that it is a particular pleasure to appear before this committee because—it is because, or was because of you, Mr. Chairman, and Senator Thurmond, Senator Biden, Senator Hatch, and other Members of this Committee, that worked for so many years in a bipartisan effort to bring sentencing reform legislation to life.

And one of the major products of the sentencing reform legislation is the sentencing guidelines which we submitted to this Congress in April of this year.

When we began our work, most of our critics, and, indeed, some of our supporters said it simply cannot be done, the task is too enormous and the time is too short for you to do what the Congress has asked this Commission to do.

And I must admit, perhaps, some times, we may have shared those feelings in the dark days of working on these guidelines, but against the odds, this Commission did meet the congressional mandate and did produce, on time, guidelines as suggested by the legislation.

And I am convinced, and I think those who study these guidelines and watch their application, as we have, around the country in various training and education, and clinical testing programs, that these guidelines do work, and the guidelines will significantly improve the criminal justice system on the Federal level.

One of the major problems with current practices—as you pointed out, Mr. Chairman, and as this Committee identified many years ago—is this problem of unwarranted disparity in sentencing practices. One defendant is sentenced to probation. Another defendant, who has committed the same crime, under the same circumstances, is sentenced to 5 years in prison because of one particular factor, and that is which judge happened to rap the gavel.

And I might say that all of the studies that we have done—and we will be glad to address this later, if you would like to get into it—conclusively support the conclusions this committee reached years ago, that we have a significant problem with unwarranted disparity, and that we can do a better job in our court system.

Unwarranted disparity breeds disrespect for the law, and it undermines public confidence in our system.

The guidelines that this Commission has submitted to the Congress meet the statutory mandate because they do provide a system whereby similar defendants who commit similar crimes will be sentenced in a similar fashion.

I doubt if one can find a more complex or controversial topic than sentencing guidelines. People have very firm, fixed, and many times inflexible opinions about what sentencing guidelines should look like and the results that should be achieved.

And we have learned, quickly, that when you do not agree with that individual a hundred times out of a hundred, then all of a sudden you are charged with being too soft on crime, or you are too tough on crime, or your methodology is unsound, or your approach is unprincipled.

And it is within this atmosphere, that this Commission, Democrats and Republicans, and Independents, coming from different backgrounds and different experiences, different ideas and philosophies, have worked and struggled and debated and listened, and we have finally come to agreement in the production of these guidelines which we submitted to you earlier.

One of the major, and I think one of the first decisions, and certainly major decisions this Commission made, was to conduct all our business in the public eye. All of our meetings were open to the public and many took advantage of that, and through that public contact, we learned a lot.

We also held public hearings, here, in Washington, and around the country, on every major issue this Commission had to address before making a decision.

We organized working groups of District Judges, probation officers, prosecuting attorneys, and defense attorneys, and Federal public defenders, who came to Washington in small groups, and worked with the Commission on various issues, and indeed, assisted us in writing the guidelines.

This was most important because by drawing on expertise from the field, from those judges and lawyers and probation officers who appeared on a daily basis in the courtroom, we were able to keep these sentencing not only theoretically sound, but practical, and workable, not just in the classroom but in the courtroom as well.

Guideline writing is an evolutionary process and what we went through is no exception to the rule. Now we published a document in September that was a very rough cut of a guideline system, but it was done to generate public comment and to provide a vehicle, and a way to encourage members of the public who had not yet been involved in our process to get involved with us.

And after that process, we received over a thousand written position papers, or briefs, a number of good ideas, and we kept drafting and moving in this evolutionary process to a draft we published in January, which was much closer to the April draft that we submitted to the Congress, but was not yet a final product.

And after going through a public hearing series, new debate and new drafts, this process resulted in the April publication that we have before you.

One of the most important things we did early on—and it took about a year, a little over, to complete the task—was to get a real clear picture of current sentencing practices in the Federal courts of the United States.

Not only were we able to see, in detail, what the sentences that are given today are, but what factors are important in the sentencing process, and for the first time this was done by any agency, of which we are aware, and was a very laborious and exacting task.

But finally, after the data had been collected and analyzed, we were able to see exactly where we were, what was the starting point for writing guidelines.

We have been charged—Commission, you have changed sentencing practices in the United States, and the answer to that is absolutely, that's exactly what we did when we thought there was a good and rational reason for doing so.

But when we changed sentencing practices because of this data that had been collected, we knew exactly where we were starting from, and then for good reason, after deliberate thought, we may have moved to a different point.

One good example is this. The data shows, conclusively, that white-collar offenders who steal, are given significantly less punishment—that is, those who steal from some sophisticated fraud scheme, than a blue-collar offender who steals with less sophisticated means.

And there seemed to be no rational basis for treating blue-collar offenders different from white-collar offenders who are committing essentially the same crime.

And so, recognizing that, we have changed that sentencing practice through these guidelines, so individuals who steal, whether the scheme is sophisticated, or not, will all be essentially fed out of the same spoon.

In the final analysis, with the abolition of parole, and the institution of determinate sentencing, these guidelines will produce a more honest system. We will have truth in sentencing for the first time. We will have a fairer system as well, because similar defendants who do commit similar crimes, will all receive similar sentences.

And finally, in my judgment, the system will be more effective because, for the first time, there will be certainty of punishment in the Federal courts of this country, and with certainty of punishment comes a contribution to the reduction of crime.

Thank you, Mr. Chairman, and Senator Thurmond.

[The statement of Judge Wilkins follows:]

Remarks of
Judge William W. Wilkins, Jr., Chairman
United States Sentencing Commission
before the
Senate Committee on the Judiciary

October 22, 1987

My name is William W. Wilkins, Jr., and I am a judge on the U.S. Court of Appeals for the Fourth Circuit and Chairman of the United States Sentencing Commission.

I welcome the opportunity to appear before this Committee, many of whose members worked for a number of years in a bipartisan manner to produce meaningful sentencing reform legislation. One of the major products of that legislation is represented by the Sentencing Guidelines and Policy Statements, which the Commission forwarded to the Congress approximately six months ago.

When we began developing sentencing guidelines almost two years ago, most of our critics and, indeed, many of our supporters said that it couldn't be done. They all said that the task assigned by the Congress was too difficult and complex, the time was too short, and that failure was inevitable. Well, against the odds the Commission did complete its work on time and has produced a set of initial sentencing guidelines that will significantly improve the current federal sentencing system. The guidelines that are scheduled to go into effect in a matter of days set into place a system that will ensure fairness, uniformity, and certainty of punishment, the central objectives of our Congressional mandate.

The Sentencing Guidelines and Policy Statements will rationalize the federal sentencing process, promote "truth in sentencing," and will, in my opinion, lead to a reduction in certain types of crime because of the certainty with which punishment will be imposed.

In October 1984 the Congress signed into law a comprehensive package of criminal justice reforms, central to which was the creation of the U.S. Sentencing Commission. I am certain that all of my fellow Commissioners seated at this table would agree that when we took the oath of office from Chief Justice Warren Burger on October 29, 1985, none of us totally grasped the immensity of the task before us.

The documents before you represent not only the hard work, thoughtful debate, and careful research of the Commissioners and our staff, but they also reflect the expertise and opinions of hundreds of individuals and groups who have provided assistance to the Commission during the past 18 months.

The initial Sentencing Guidelines and Policy Statements, submitted to the Congress and this committee on April 13, 1987, and followed two weeks later by a series of technical, conforming, and clarifying amendments, reflect the Commission's philosophy that public policy is only as good as the quality and breadth of the public input that goes into its creation. From its inception the Commission has conducted its business openly, consulting frequently with working groups of judges, probation officers, prosecutors, and defense attorneys, holding 13 public hearings across the country, and opening all its business meetings to the public.

Throughout its continuous dialogue with individuals and groups interested in improving the federal criminal justice system, the Commission received more than 1,000 letters, position papers, and related documents on issues ranging from offense seriousness to organizational sanctions.

The Comprehensive Crime Control Act of 1984 delegates to the Commission broad authority to review and rationaliza the federal sentencing process. The statute instructs the Commission to develop categories of offense and offender behavior, and prescribe guideline ranges that specify the appropriate sentence for each class of convicted offender.

The statute contemplates that the guidelines will establish a range of sentences for offense and offender categories. Where the guidelines call for imprisonment, the maximum term of imprisonment in the range cannot exceed the minimum by more than the greater of 25 percent or six months.

In determining the appropriate sentencing range for each offense, the Commission began by determining the sentences currently imposed in our federal courts. It also examined the sentences specified in congressional statutes, the parole guidelines, and other relevant, analogous sources. The Commission did not bind itself to current sentencing practices in developing its guideline ranges, but it did use them as a logical starting point.

While guideline sentences will, in some instances, approximate existing sentencing practice, adherence to the guidelines will eliminate wide disparity. In some instances, a sentence of incarceration will replace the existing practice of wide variability in sentences in which some offenders receive probation while others receive several years in prison for the same offense. Based on its detailed statistical analysis, the Commission has determined that certain white collar offenders receive disproportionately lenient sentences under existing practice compared to other offenders who commit equivalent offenses. In such cases, the Commission made a policy decision to deviate from existing practices by increasing the probability that offenders who commit serious economic crimes will receive a term of incarceration.

One of the most important practical issues the Commission had to resolve in developing a system of guideline sentencing was that of striking a balance between complexity and simplicity. A guideline system must be sophisticated enough to distinguish between offenders who violate the same statutory offense but in significantly different ways. A guideline system that fails to recognize such distinctions would unfairly lump together dissimilar offenders who, while technically violating the same statutory offense, did so in significantly different ways that should be recognized at sentencing. It is true that disparity would be reduced under such a system, but only at the expense of great unfairness.

A complex system, on the other hand, has a great virtue in that it is able to precisely distinguish offenders by taking into account, often in minute detail, numerous characteristics that may arguably be relevant in the sentencing decision. While increasing the potential for fairness, such a system suffers the great drawback of being so complex that it is virtually unworkable.

The guidelines submitted to Congress and this Committee on April 13, 1987, strike an appropriate balance between these competing concerns and will achieve the ends envisioned by Congress in establishing the Commission. The guidelines establish sentencing policies and practices that meet the four purposes of sentencing, namely, just punishment; deterrence; incapacitation; and rehabilitation; they reduce unwarranted disparity; and they ensure that sentences will be fairer, more certain and honest.

The Commission views guideline development as an evolutionary process. It expects, and the governing statute anticipates, refinement of the guidelines over the years based on continued research, experience, and analysis. To this end, the Commission is established as a permanent agency with the authority to submit yearly amendments to Congress and monitor sentencing practices in the federal courts throughout the nation.

Mr. Chairman, now that it is clear, in my judgment, that the guidelines will take effect as scheduled on November 1, 1987, it is most important and appropriate that Congress promptly address a number of legislative issues now before this Committee which are critical to the smooth, successful implementation of the Sentencing Reform Act and the guidelines. In several instances, enactment of remedial legislation prior to November 1 may be necessary in order to avoid ex post facto problems. In a number of other cases, legislative resolution is highly desirable before any significant number of sentences are imposed under the new system because of the benefits associated with the pending proposals.

In late January of this year, the Sentencing Commission forwarded to Congress a number of legislative recommendations. In early September, the Commission revisited those original proposals and added a number of others which had come to our attention in the interim. Meanwhile, the Judicial Conference and Administrative Office of the U.S. Courts also have proposed a number of amendments to the sentencing provisions of the 1984 Comprehensive Crime Control Act, and the Department of Justice has informally put forward a number of suggested amendments. Since there was substantial overlap and commonality among these proposals, recently staff of the three agencies have joined their efforts and, working with staff of this Committee, have produced a common work product which is now pending before the Committee.

On Tuesday last, the Commission reviewed this joint staff legislative product. Several of the proposals in this package, such as the phase-out of the Parole Commission, are not within the sphere of the Sentencing Commission's responsibilities and, for that reason, we have not formally taken a position on those issues. However, most of the issues in this package do affect the work of the Commission, and the Commission has reviewed and approved those proposals. I will not take the time of the Committee to discuss each individual issue which the Commission has considered and adopted in this package, but I would like to highlight several of the more important ones.

Prospective application of guidelines to crimes committed after effective date. To date, perhaps the most frequently asked legal questions relating to implementation of the sentencing guidelines is whether the Sentencing Reform Act and the guidelines apply to sentences imposed, prosecutions commenced, or crimes committed, on or after the November 1 effective date. The current statute does not explicitly address this important issue, and the accompanying legislative history is confusing at best. Thus, one of the Commission's legislative recommendations is that the law be clarified to make the guidelines apply prospectively to crimes occurring on or after November 1. This objective, which is consistent with the ex post facto clause of the Constitution, is accomplished in Section 102 of the draft bill before the Committee. Its prompt enactment will settle many questions and avoid unnecessary litigation. It will also provide a natural phase-in of the guidelines and the new sentencing system. This transition period will accommodate further training, changes in court rules of procedure, and other necessary adjustments.

Organizational offenders. The composite bill contains, in section 108, a provision which corrects an apparent oversight in the drafting of the sentencing provisions in the 1984 Act with respect to the prohibition of probation for the most serious felonies. The amendment would clarify that the prohibition applies only to individuals who commit Class A or Class B felonies--cases in which probation is clearly not appropriate. At the same time, if an organization should be convicted of a serious felony--such as a drug law violation--it may be desirable to impose both conditions of probation and a fine. The current law would allow that combination for organizations only in the case of less serious offenses, an anomaly clearly not intended by Congress. This particular amendment is timely, since the Commission plans to promulgate additional guidelines for organizational offenders next year.

Extend maximum terms of supervised release. One of the more important crime control and rehabilitative amendments in this package is the proposal in section 109 to extend the maximum terms of supervised release from three to five years for Class A or B felonies and from two to three years for Class C or D felonies. Simply put, the Commission views the current maximums as inadequate to accomplish the desired purpose of safely and effectively re-integrating offenders into society after substantial periods of incarceration. The current limits are logically inconsistent with the five-year maximum term of supervisory probation applicable to less dangerous offenders. This amendment would more nearly conform the maximum terms of supervision after a term of imprisonment to those authorized for probation and would further the objectives of the 1984 Comprehensive Crime Control Act.

Petty offense exclusion. An issue of great concern to probation officers, magistrates, and the Sentencing Commission has been the workload associated with preparing presentence reports, applying the guidelines, and reporting to the Commission the sentence results for each of the nearly 70,000 petty offenses (approximately sixty percent of all federal prosecutions) processed each year before federal magistrates. The Commission, the Probation and Magistrates Divisions of the Administrative Office of the U.S. Courts, and the Justice Department have jointly concluded that the burdens associated with these requirements far outweigh the conceivable benefits, and have proposed an amendment, which is embodied in section 117 of the draft bill. The amendment would provide that if the Commission has not issued a guideline applicable to a petty offense, the court would impose an appropriate sentence consistent with the purposes of sentencing; however, a presentence report, application of the guidelines, and subsequent report to the Commission on the sentence imposed would not be required. Under the amendment the Commission retains the prerogative to promulgate guidelines and require information reports for particular petty offenses where it would further the interests of justice. In fact, the Commission has already covered some petty offenses in the guidelines, such as trespass and simple assault.

Reasons for within-guideline sentence. After considerable thought and discussion, the Commission has been persuaded that the current law requiring a statement of reasons by the sentencing judge should be amended to a limited degree. The law now requires the judge to state in open court his reasons for the particular sentence, including the reasons for choosing a "particular point within the range" prescribed by the guidelines, or, if he departs from the sentence called for by the guidelines, the specific reasons for the different sentence. In general, the Commission views the requirement for a specific statement of sentencing reasons as a fundamental part of the Sentencing Reform Act. At the same time, if the judge sentences within the guideline range, it is unnecessarily burdensome, impractical, and possibly counterproductive to require a precise justification of the particular point within the range selected by the judge. For example, if a judge, applying the guidelines to a bank robbery case, determines and states reasons for a guideline sentencing range of, say, 41-51 months, it is unduly burdensome and of minimal value to have the judge further state reasons for the precise point within that 10-month range which he chooses. This existing requirement has met with strong resistance among federal trial judges, and its deletion may provide a further incentive to adhere to the sentencing guidelines. The proposal to accomplish this change is contained in section 118 of the draft bill.

Emergency guideline authority. Another important provision in this draft bill is section 124, which would provide limited authority to the Commission to promulgate a temporary sentencing guideline in certain exigent circumstances. The circumstances which would permit such Commission action are enactment of a new criminal offense statute, or amendment of an existing statute, invalidation of an existing guideline by the courts, or other urgent and compelling reason determined by the Commission and relating to a previously issued guideline. The need for this amendment arises from the present statutory constraints on promulgation of amendments to the sentencing guidelines. These constraints effectively restrict the submission of amendments to Congress to the first five months of each year. Thus, for example, if Congress enacts a criminal statute after May 1, or an existing guideline should be invalidated by the courts after that date, or serious problems arise in the application of a particular guideline, the Commission at present cannot quickly respond to the emergency with a temporary, corrective guideline. In fact, since the statute also provides a six-month Congressional review period for amendments to guidelines after their submission to Congress, the "lag time" between the event creating the need for a guideline amendment and the taking effect of such an amendment could exceed one year.

Understandably, this proposal may raise some concerns regarding the additional authority given to the Commission. Let me assure any who have such concerns that the Commission's motive is simply to be able to respond promptly with guideline amendments as needs arise, and not to circumvent the existing guideline amendment process. In keeping with this objective, the language of the amendment is designed to carefully limit the circumstances in which it would be appropriate to exercise this authority. Moreover, any temporary guideline issued by the Commission under this authorization would last only so long as necessary to put into effect a permanent replacement, and could be sooner nullified if necessary by action of Congress.

Standard for departure. Finally, Mr. Chairman, I would like to explain, in some detail, a proposed amendment to the so-called "standard for departure" provision of the Act which the Commission feels is critical to the successful implementation of the guidelines.

The current departure standard contained in 18 U.S.C. § 3553(b) is indefinite, subjective, and impractical. It would unduly complicate and delay both sentencing proceedings and appellate review of sentences, as the courts wrestle with the question of whether a particular factor alleged as a basis for imposing a different sentence has been "adequately considered by the Sentencing Commission in formulating the guidelines" to quote the language of the present law. Moreover, the existing statutory language raises the possibility of subjecting the Commission and Commissioners to repetitive, time-consuming, and unnecessary legal process in order for the courts to make the necessary determinations--a result which is clearly not what Congress intended.

The proposed substitute seeks to avoid these problems and to provide a more practical, objective departure standard. It would require, first of all, that the imposition of a sentence different from the sentence called for by the applicable sentencing guidelines depend on the court finding the presence of some aggravating or mitigating circumstance that constitutes a compelling reason for departing from the guideline sentence. The departure sentence, as with any sentence imposed under the Sentencing Reform Act, must comply with the fundamental purposes of sentencing set forth in the statute (18 U.S.C. § 3553(a)(2)).

Secondly, the aggravating or mitigating circumstance alleged as a basis for a different sentence must be one which is "not expressly addressed in the guidelines, policy statements, and official commentary of the Sentencing Commission." In other words, if the Commission has explicitly indicated that a particular factor has been provided for in the guidelines, the court may not use that factor as a reason for going outside the guidelines, unless the factor is present in such an unusual degree that the court could reasonably find that the Commission has not addressed that particular situation in the guidelines.

The phrase "not expressly addressed by the guidelines, policy statements, and official commentary" in the proposed substitute language should not be read as precluding a departure in those instances where the Commission has both expressly addressed a factor and specifically invited, or suggested the appropriateness of, a departure if the factor is present. In such cases, the statutory phrase "not expressly addressed" should be construed as reading "not inconsistent with" the guidelines, policy statements, and official commentary of the Commission.

To illustrate, the Commission has issued a sentencing guideline on consumer product tampering (guideline §2N1.1) which reflects the risk of death or serious injury posed to significant numbers of people by this offense. However, in commentary accompanying the guideline, the Commission affirmatively states that if the offense actually resulted in death or bodily injury or other substantial, actual injury, then an upward departure from the guideline sentence may be warranted. Thus, if a court should be faced with a product tampering case in which the offense resulted in actual bodily injury to one or more victims, an upward departure from the guideline sentence might be appropriate. This would be true even though the Commission has clearly contemplated and "expressly addressed" the possible occurrence of such an aggravating circumstance because the Commission clearly has not factored it into the sentencing guideline.

In other cases, the Commission has expressly and affirmatively suggested the appropriateness of a downward departure from the guideline sentence if a particular mitigating circumstance exists. For example, a number of the environmental offenses guidelines contemplate that the defendant committed the crime "knowingly." In commentary accompanying the guidelines, the Commission expressly states that if the offense was associated with a negligent state of mind, then a downward departure may be appropriate.

In summary, this important amendment is designed to provide a standard which is workable and balanced in the degree to which it, on the one hand, requires adherence to and, on the other hand, permits departures from the guidelines. It also is designed to make absolutely clear that the court, in making these determinations, is to limit its focus to the "four corners" of the officially promulgated guidelines, policy statements, and commentary of the Sentencing Commission. The amendment would definitively preclude the possibility of any legal process directed at the Commission, individual Commissioners, or staff in an effort to look behind or beyond those official Commission pronouncements in order to discover intent or resolve matters in dispute.

Mr. Chairman, prompt passage of these amendments that I have specifically discussed, as will as the others in the bill before the Committee, will ensure a smoother implementation of the new sentencing law and further the purposes which that legislation seeks to achieve. These proposals have been carefully worked out among all interested parties. That is certainly in keeping with the spirit of cooperation which brought together Senators Biden, Kennedy, Thurmond, and other members of this Committee in common authorship of the truly bipartisan and historic Sentencing Reform Act title and other parts of the 1984 Comprehensive Crime Control Act. At the advent of this new and dramatically different sentencing system, which we believe will significantly improve the quality of justice dispensed by our federal courts, we seek your assistance with these legislative proposals and pledge our continued cooperation with you in furthering our common objectives.

Senator **Kennedy**. Thank you very much. Judge Breyer, we welcome you back to this committee room. I think all of us on the panel, and certainly up here, know of your very consistent good work in helping this committee in considering a variety of pieces of legislation. We welcome you back.

Judge **Breyer**. Thank you, Senator Kennedy. I know that I speak for all the Commissioners—Block and Nagel, MacKinnon, Corrothers, the Chairman, Judge Wilkins, and myself—in saying that we are pleased and honored to be here before this committee and two former Chairmen of the Senate Judiciary Committee, where this legislation that authorizes sentencing guidelines was born.

We know that you, Senator Kennedy, and Senator Thurmond, forged a bipartisan coalition that worked for 10 years on criminal code reform. That you reported out of this committee, five times, the revision of the Criminal Code, and that finally, the centerpiece of that legislation, the legislation authorizing the Sentencing Commission and the guidelines, was enacted into law.

And the Chairman, Judge Wilkins, and the other members of this Commission before you today, have tried to follow your example. We have tried to work through compromise and consensus, and the result, we believe, is a set of guidelines that six of the seven of us are pleased to support.

We believe they are coherent in principle, that they are ready to take effect, and that they are faithful to your legislative mandate, the language, and your basic intent, the intent to produce a fairer and a more effective sentencing system.

Now what I have been asked to do in about 15 or 20 minutes—is to go through the theory of these guidelines.

I believe we can teach the basis of this document to the Federal judges in 2 hours. I will not take 2 hours, but I think I can give you the essence of it in about 15 minutes. The Federal judges will have 2-day seminars and intensive training sessions. We believe they will be able to learn it in that time.

The reason it is such a big book is that there are many Federal criminal laws. Minnesota, in its guidelines dealt with 88 statutes, and the State of Washington dealt with about 120. We deal with about 880 Federal criminal statutes. But in fact the book is not too complicated to use. I want to do three things: I want to review what the basic purpose of the legislation was. I want to go through the basic way this document works, and I would like to deal with what I see as the six basic objections or problems that people have raised with these guidelines.

First, what are the basic purposes of your legislation? I think the basic purposes were two. One, you wanted honesty in sentencing, and, two, you wanted less disparity.

Now what did "honesty in sentencing" mean? It meant this: Today, a Federal judge says "go to prison for 12 years," but everyone knows that the parole commission may cut that 12-year sentence down to four. More over, the Federal judge may think: I'll give him twelve because he'll get four. But the parole commission may fool the judge and keep the offender in prison for 8 years. The Federal judge and the parole commission may play games with each other. To avoid this kind of problem you said "we want the sentence that is given to be the sentence that is served." With one minor qualification—54 days of your good time after the first year. The statute provides that the sentence that no judge gives is the sentence that the offender serves.

Now, when we say in these guidelines you are going to get, say, 4 years, we do not say you are going to get 12 years. I mean, we base the sentences in these guidelines on sentences that are now really served, not the ones that the judges give that are later cut down.

But that is the basic idea behind the goal of "honesty." How did you do it? You said abolish parole. You said the sentence the judge gives is the sentence that will be served.

Your second basic idea was more uniformity. As Judge Wilkins pointed out, it is silly for some Federal courts to have to have a lottery system where judges are assigned by lot, in part, because some defense attorneys believe that the sentence given depends on what judge you get. That should not be. You dealt with that by setting up this Commission and telling this Commission to write guidelines that will not eliminate all disparity, but that will cut down on great disparity. They will produce sentences that move towards the average, they will truly produce a basically fairer system and a more effective system. That is what we tried to do. Those are the two basic purposes.

Now, let me turn to an example. Take the book and perform six steps. We have a robber. The robber has robbed a bank of $40,000. He has pointed a gun at the teller and he has one prior conviction.

Step One. The judge goes, and he looks at the statute foundation. He finds the number of the statute. He looks in the index for the number, and the index leads him to page 2.17, which says "Robbery."

Now, frankly, most judges know the word robbery and they will not even have to look at the index, but they can find "Robbery" on page 2.17 through the index if they need it.

Step two. They look at page 2.17. It says "A base offense level for robbery is 18."

Step three. Are there any "special offense characteristics" about this robbery that appears on page 2.17? We have written about four or five on that page. He had a gun, which he pointed at the teller. He will get level 18 only if he did nothing extra. He had a gun, so he gets three extra for that, and he stole $40,000, so he gets two extra for that. So we are up to twenty-three.

Step four. Are there any general adjustments that can apply to all crimes. The guideline provides seven general adjustment features. Is there something special about the victim? Is he specially vulnerable? Is he an official? Was he abducted? There are two or three other things. Did he lie during his trial, try to obstruct justice? Did he plead guilty, accept responsibility? And does he have several counts? That is not too hard for the judge to work out.

The fifth step is past record. His past record here involves one prior conviction. He receives points (not levels) in light of prior convictions. The sixth step is to turn to page 5.2, where you see a chart. Our offender is at level 23 because of his crime. He had one prior serious conviction, which puts him in column II. You read the box at level 23, column II. It says 51 to 63 months. That is about 4 to 5 years.

The judge will decide whether the sentence is closer to 4 years, or closer to 5 years. Now that is how the guidelines work. You will find that a 4- to 5-year sentence, for a person who takes a gun; points it at a teller, takes $40,000, and has one prior conviction, is about what happens now, on average.

Now I need about 10 minutes to go into what have been the six main questions raised about these guidelines. These are the six:

First. Where did the guidelines numbers come from? Did the Commission make them up out of whole cloth, or out of your head?

The answer to that is we did not make them up out of whole cloth. We did not make them up out of our heads. The short answer is, they basically came from present practice.

Now look at the Commission's supplementary report. I want you to see that on page 27 through page 39, there are charts and numbers. Those charts and numbers are a rough summary of 10,500 actual cases in our computers, and 35,000 other cases that were not analyzed as closely. They told us what happens now. We had these summaries in front of us. We looked at the summaries.

Remember, I told you that the guidelines are specific offense characteristics. I told you that a robber who hurts a victim will get an extra punishment. It says that in the robbery guideline, but the robbery guideline does not say that a robber who kills somebody gets an extra sentence. Why? How can that be? Why did we say a robber who hurts somebody gets three or four or five levels added, but a robber who kills somebody does not?

The reason is the following. In our computer, there were 1100 actual cases of robbery. Those 1100 actual cases involved 40 robbers who hurt somebody. They involved three robbers who killed somebody.

We thought to ourselves, something that happens 40 times out of 1100 instances, happens often enough so that we should write a special provision in the guideline to tell the judge how to deal with it, and so we did.

Something that happens three times—the death—in 1100 instances, is something that is unusual enough that we would not need to write something special in the guideline. What is the judge supposed to do when he gets that case of the robber who killed somebody? He is supposed to depart. That is how the guidelines work.

What these guidelines reflect, in their base offense levels, and the specific offense characteristics, is what normally happens now. When something unusual happens in the case before the judge, the judge departs.

Where did the numbers come from? I told you basically where the numbers come from.

Senator **Kennedy**. May I ask just a question.

Judge **Breyer**. Yes.

Senator **Kennedy**. Why wouldn't you have under that, say, murder? Why wouldn't you put that——

Judge **Breyer**. Because the basic way that the guidelines work——

Senator **Kennedy**. Is what the charge is?

Judge **Breyer** [continuing]. Is the judge looks to what is charged, and probably that is why there were only three instances where somebody actually killed somebody. Normally when a robber kills somebody, they charge him with murder, and then the judge would look to the murder guideline. That is how it would normally work.

The numbers, too. The numbers come from these charts, but with an exception, an important exception that Judge Wilkins mentioned. The important exception is the following: Look at this chart—it is really quite interesting because it bears out what you, Senator Kennedy, Senator Thurmond, Senator Biden, and others, have been saying for a long time. It absolutely bears it out, empirically. If you look at theft in these numbers on page 28 in the supplementary report, you discover that a person who steals a certain amount of money, on average, gets a certain sentence. Then look at page 33 to what happens with "fraud." You will see the same is true, but for each amount of money stolen, the average sentence given today is lower than for the same amount of money taken through theft.

We looked at that and said, why is it today that, on average, a person who steals $50,000 today gets one sentence, and a person who defrauds somebody of $50,000 gets a lesser sentence? Why should that be? Fraud after all is just larceny by trick. And, larceny by trick is another kind of theft. The answer seems to be that what you have been saying for quite a long time is true: namely, that white-collar crimes, on average, tend to receive a lower sentence. We thought that that should not be; there is no good reason for that; and so we raised one sentence somewhat for the white-collar crime so it matches the blue-collar crime.

That is why I say the numbers here, basically, but not entirely, reflect present practice. There is some adjustment upward, particularly, but not entirely, in the area of white-collar crime.

Senator KENNEDY. I do not want to interrupt your flow, but how would you—you draw the distinction if violence is used, in terms of the——

Judge BREYER. In almost all these instances, where violence can, often—40 times out of 1100—accompany say the robbery that is charged, you will get a kicker.

Senator KENNEDY. Kicker.

Judge BREYER. There will be a kicker in there. And of course, by and large, where you charge a crime of violence, the guidelines reflect the higher average sentences given under present practice. So both of those things are there.

All right. Second big question. What is this going to do to the prisons? What is going to happen to our prison population?

Commissioner Block can spell them out better than I can. He supervised a very elaborate prison-impact study. This study has been studied itself by GAO. GAO has said that our results are "reasonable." We had an MIT professor. We had the Bureau of Prisons' staff. We had our own computer staff. They used the 10,500 cases, they used other data, and they came out with a range of predictions. Because it is hard to predict the future, their results are stated in terms of a range that varies depending upon what assumptions you build in.

This range says that, as a result of these guidelines, prison population will be somewhere between 2 percent less and up to 10 percent more, with the guidelines than what it otherwise would be without the guidelines.

I specified the comparison is with what it otherwise would be. Even without the guidelines prison population will go up. It will go up because of the new mandatory sentences in the new drug law. It will go up because of a special-offender provision in the statute which is mandatory.

It will go up anyway, guidelines or no guidelines, and it will go up a lot. The guidelines add to what will happen anyway somewhere between minus two, and plus 10 percent, with approximately a 6 percent increase being the most likely.

That increase, which and others can characterize, I characterize as a fairly small increase. To me that prison impact study result is evidence that what I said before is true. That we did base these guidelines on present practice, roughly, with some increases primarily in the white-collar area.

Three. What about departures? How do they work? Departures work roughly as I have said. Look at page 1.6 of the guidelines. A paragraph on page 1.6, spells out that these individual guidelines are aimed at a "heartland." Robbery deals with the typical robber. "Robbery where a person is hurt," deals with the typical robbery where a person is hurt. When there is something unusual before the judge, whether that unusual thing is death, or whether that unusual thing is something that calls for mitigation, the judge will depart.

The departures will be reviewed in the courts of appeals for "reasonableness." If over time, the courts of appeals and the judges are departing too often, or for bad reasons, the Commission can promulgate further guidelines—and it will—that will limit those departures to make them more rational.

In Minnesota they discovered that in the first year, or two, there were quite a few departures, maybe 17–18 percent. Over time, the number of departures diminished radically, until maybe you have 7 to 11 percent departures at the moment.

Question 4, what about probation? Probation is a subject that has led to considerable controversy I would like you to know what the Commission did. In this area there was a considerable amount of compromise that led to a consensus.

What the Commission did in respect to probation is the following: It basically took very small crimes, and said in respect to small crimes, the judge is free to provide probation. That is in respect to crime of guideline Level 6 or below. Then the Commission took a range of more serious crimes, a range of crimes where today quite a lot of people receive probation without confinement, and as to some of those—but not all—it said that a "confinement condition" is required when the judge gives probation. What is a "confinement condition?" The confinement condition consists of 1, 2, 3 or 4 months in a halfway house, community treatment center, nights or weekends in prison. There are some people who think that that is too harsh. The example that the judges who oppose this approach have used in testimony is the following—and they have used it as a fair example: A woman embezzles $15,000. She is very sorry about it. She has returned the $15,000 and she pleads guilty. One of the judges opposing the guidelines said that this is a defendant to whom he would give probation without confinement. The guidelines change that. What the guideline specify for that woman who takes the $15,000, gives it back, pleads guilty and accepts responsibility, is 1 month of night and weekends in prison or in a community treatment center. That means that that person would have to serve 20 evenings and 8 days in confinement. I think you have a consensus among us that that is not too harsh a sentence, 20 evenings and 8 days, even though the woman is sorry, has given the money back. After all, she did embezzle $15,000. In any event, I think that is a reasonably good example of what the Commission has done by way of increasing the severity of sentences dealing with probation.

Of course, there is a reason for what the Commission did. If you look at the Supplementary Report which has the present procedure numbers in it, you will find that we had before us on these charts with the X's which say, over on the side, how many people today get probation. They tell us crime by crime what percentage of people now get probation. And it says in the columns what happens, on average, to the people who do not get probation.

We had those numbers before us. The charts told us that where the numbers on probation are high—probation without confinement—are in areas such as tax evasion, antitrust price fixing, fraud, embezzlement—again, the white-collar crime areas. We said in respect to such offenders that it may be a deterrent to say, "You must serve a month or two or three or four in community treatment centers or nights and weekends in jail." That decision inevitably means in the future there will be less of pure probation without any confinement. That decision was essentially related to our treatment of white-collar crime—the desire to be fair, as well as the desire to be effective.

Regardless, that is what the guidelines do. I think you have a fair example. I will leave it to others to characterize whether that is too severe or not too severe.

Senator THURMOND. Mr. Chairman, excuse me just a minute. I have an urgent strategic meeting in the Defense Committee. If you will excuse me, I will go.

I want to commend you, Judge Breyer, and commend the Chairman, Judge Wilkins and all of you people for the great job you have done. You are making a very fine explanation.

I do have to go to this meeting, but I want you to know, though, that I will read your testimony. I want to thank all of you for your fine service, and I want to say that you are to be congratulated for what you have done here. It is a great service to this committee; it is a great service to the whole country. I just hope we can get these guidelines approved here shortly.

Thank you very much, and thank you, Mr. Chairman.

Senator KENNEDY. Thank you, Senator Thurmond. I hope you will represent my good views at that defense authorization meeting as well. Maybe I ought to leave, too, to keep my eye on it over there.

Senator THURMOND. It will be a pleasure to represent you there. [Laughter.]

Senator KENNEDY. We have got a full panel, but I am obviously enormously interested. Say that person was a mother and say she had two sick children or had a retarded child. Where does that fit in?

Judge **Breyer**. Where it is unusually difficult for the offender to serve any confinement? You mean she has a terrifically good reason why she could not serve the eight weekends?

Senator **Kennedy**. Yes.

Judge **Breyer**. They might work out an arrangement in the community treatment centers. But the ability of the judge to depart is there. If the departure is a reasonable departure, the Court of Appeals will uphold it. If it is not, they will strike it down. And if we discover the "departure" provision is being abused, we can tighten it up. But that mother would be taken care of if she is reasonable in that she has a special case.

Senator **Kennedy**. I think one of the important aspects that we recognized in 1984, with the appeals, that that is also going to develop into sort of a form of law—a common law—with the appeals.

Judge **Breyer**. Yes.

Senator **Kennedy**. And then we will get back to the consistency in that area as well and predictability and certainty over a period of time. There will be these kinds of cases, and the courts will try to deal with them rationally and reasonably, and those cases will be appealed. We will develop that understanding. If that becomes egregious, we have got the Commission to try and review those cases.

So I think that that is what was certainly intended, and I think that what you are explaining to us is certainly consistent. I hope you will continue.

Senator DeConcini, we have had an excellent presentation here, and now Judge Breyer is noting some of the concerns that have been expressed and is responding to them. You are on point No. 5.

Judge **Breyer**. Yes. And there are only six altogether. We have been through where did the numbers come from, departures, and what about prison impact, and we talked about probation.

The fifth problem and one in respect to which there has been considerable criticism from opposite points of view is plea bargaining. What about plea bargaining? Plea bargaining today is involved in about two-thirds of all Federal sentences. Many Federal sentences, and much of the Federal system is driven by plea bargaining in one form or another.

We heard a lot about plea bargaining. We heard people tell us to do opposite things about it. There are some judges who think plea bargaining is absolutely terrible. There are others who think it is essential and highly desirable. There is a wide range of opinion.

What we ended up doing, is to leave it roughly where we found it. We do not know enough yet to change something that is so important empirically in the Federal system. We will rationalize plea bargaining some in the following sense: The judge for the first time will hear from the probation officer what really happened, from the probation officer's view about what really happened in the crime will be written in a report. The judge will see that. The judge will also see in this guideline book what the sentence would be, given what really happened, if there is no plea bargain. The judge will also ask the prosecutor, the defense lawyer, what is your reason? Why are you entering into this plea bargain? And in light of those three things, the judge, if he is going to accept a plea bargain that is different from the guideline, will have to give his reason. He will have to give the reason why he accepts it. The Commission will collect those reasons, and, it will analyze those reasons. We will learn what really happens with plea bargaining, something no one knows today, and eventually we will be able to promulgate guidelines that deal with it in a rational way.

Again, if there is abuse of plea bargaining, we should find out what is going on. Then when we know what is going on, we can change sentences. We think it would be a mistake now, drastically to change the rules of the plea bargaining game in a mandatory way without knowing more than anyone knows now about what really happens in plea bargaining, why those plea bargains are accepted. We must be able to examine judges' reasons to aid a rational system for dealing with plea bargaining. When we find that out, we will then begin either ratify existing plea bargaining practices or tailor new ones. That basically is what we have done.

Sixth, I will respond to a procedural criticism that I think is wrong.

There are those who have argued strongly as follows: remember our robber who was convicted of bank robbery. He had a gun and he pointed it at the teller, and, let us say, he hurt the teller. The sentence goes up because he hurt teller. The sentence goes up because he had a gun.

There are some critics who argue that the guidelines are not fair because the jury which convicted the defendant of bank robbery, did not necessarily find that he had the gun. It would depend on the indictment. The jury did not necessarily find he had a gun or that he hurt the teller. The critics say that the guidelines will increase the sentence because of what the judge later finds happened and the judge holds only an informal hearing rather than a full due process hearing.

What is wrong with that argument? Simply this: The people who are making that argument are not comparing what we have done in these guidelines with what happens now.

At the Eighth Circuit Judicial Conference, I tried the following experiment, with about 150 judges. I gave the following example. Imagine you have two people in front of you; one is a bank robber who did not have a gun, and the other is a bank robber that you know only from the pre-sentence report has a gun. The cases are otherwise identical. I want all of you who will give those two people the same sentence raise your hands. You know how many raised their hands? Zero. Not one person.

I said, now all of you who will give the person with the gun a longer sentence, raise your hands. About two-thirds raised their hands. This illustrates the obvious fact that today a bank robber would receive a longer sentence if he injured the teller. We know that from our data. Any judge will tell you that. And today there is no procedural protection. There is next to nothing.

If I am totally honest about my last statement, I will add that it is not quite true. A defendant today can ask the judge for a hearing about whether or not he had the gun or hurt the teller. And the judge must give him a hearing. But many judges will tell him not to worry about the gun; they will say they will not provide a hearing, because they will not take the gun or the teller into account in the sentence. But many defense attorneys think many such judges really do take such things into account anyway psychologically.

Given those underlying facts about procedures today, I do not see how anybody can say that the more formal procedures that we have set up in these guidelines make any defendant worse off in that respect than he is right at this moment. That is why I say that criticism is a mistaken one.

I know there are many other criticisms, but I will not go into them now. I have tried to give you what we feel about the main six criticisms and give you a brief summary of how these guidelines work. If you want to go into them in detail, you can read the first 12 pages of these guidelines and then go through them with examples. I have tried to give you the major purposes, fairness and honesty, the six basic steps of how they work; and the six major criticisms and our responses.

I think I will stop.

[The statement of Judge Breyer follows:]

Testimony of Sentencing Commissioner Stephen Breyer[1] before The Senate Committee on the Judiciary

October 22, 1987

Mr. Chairman,

It is an honor and privilege for me to testify before this Committee, where you, Senator Kennedy, Senator Thurmond, and other Committee members, forged the bipartisan coalition that, after ten years of work, enacted comprehensive sentencing reform into law. Now, the United States Sentencing Commission has transmitted to you the initial Sentencing Guidelines, which we hope and expect will fulfill your legislative mandate.

Relevant committees of the Judicial Conference, probation officials and six Commissioners believe these Guidelines are workable. The Government Accounting Office, after five months of scrutiny has found that the Commission's prison impact projections appear to be "reasonable" and has advanced no significant criticism of its quantitative methodologies. We believe these Guidelines carry out your desire to develop a more honest, more uniform sentencing system. In this statement, I shall simply summarize what I see as the major changes the Guidelines will introduce, describe briefly how they work, and then go on to answer certain questions that others have asked about the initial Guidelines.

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[1] Circuit Judge, United States Court of Appeals for the First Circuit.

I

Summary

The Guidelines will bring about the following changes: First, parole release will disappear. Today, a judge may sentence an offender to twelve years, but, with parole, he may serve only four. In the future, the sentence the judge imposes is basically the sentence the offender will serve.

Second, sentences will become more uniform. Today, a sentence may depend on the luck of the judicial draw. (Certain courts actually use a lottery to assign judges because defense lawyers believe some impose more lenient sentences.) In the future, judges will determine a 'normal' sentence by looking to the Guidelines, most of whose categories, distinctions, and sentences reflect typical existing sentencing practices (as determined by analysis of 10,500 actual cases). Judges who impose sentences different from the norm must explain why and have their sentences reviewed for reasonableness by a court of appeals.

Third, contrary to what some have claimed, the Guidelines will increase prison population only slightly. The Commission/Bureau of Prisons study predicts a likely increase of about 6 percent. (Prison population will rise far more because of mandatory sentences in the new federal drug law.)

Fourth, many offenders who today receive probation in the future will have to spend nights and weekends for one to six months in half-way houses or "community treatment centers." This change in part reflects Commission efforts to rationalize existing sentences by treating the white collar fraud offender as severely as the blue collar theft offender, and its view that short, but definite, terms of confinement will help deter such crimes as tax evasion, price fixing, and insider trading.

Since the Guidelines significantly change sentencing methods, the Commission will begin a long-term monitoring process to find out when (and why) judges depart from Guideline norms, as well as when (and why) they accept plea agreements between prosecutors and defendants. This information and analysis will help refine and improve the Guidelines over time.

I recognize, Mr. Chairman, that the Guidelines will not please everyone. Inevitably, some will say these initial Guidelines do too much; others that they do too little. In fact, the Guidelines proceed cautiously, directing judges towards typical sentences, but allowing departures in unusual cases. The Guidelines cannot be viewed as a final, static product. Rather, they begin an evolutionary process -- a process that will lead to a fairer, more effective sentencing system.

II

It may help to understand the criticisms and commentary about the Guidelines if I set forth very briefly the mechanics of how the Guidelines work. Imagine the case of a bank robber, with one serious prior conviction, who robs a bank of $40,000 and points a gun at the teller. The sentencing judge (and probation officer) would proceed through the following steps.

1) Look up the statute of conviction in the statutory index. The index will lead the judge to § 2B3.1. Robbery.

2) Take the base offense level for Robbery (18).

3) Add any specific offense characteristics. (Here, add 2 for the money taken and 3 for the gun.)

4) See if any "adjustments" (from ch. 3) apply. (They include vulnerable victim, official victim, abduction of victim, role in the offense, efforts to obstruct justice, acceptance of responsiblity, and rules for multiple counts.)

5) Calculate criminal history score on the basis of the offender's past conviction record. (Here, §4A1.1 assigns 3 points for one prior serious

conviction.)

6) Look to the table at page 5.2 to determine the sentence. Here, an offense level of 23, with 3 points for the prior conviction yields a range of 51 to 63 months (about 4 to 5 years) in prison for this armed robbery by a previously convicted felon.

The Guidelines also contain rules for calculating a fine, for imposing a term of supervised release, for restitution, and so forth. But, the basic steps are the six that I have listed above.

III

Let me now turn to several questions that are being asked about the Guidelines. For the most part the answers to these and other questions are set forth in the first twelve pages of the Guidelines (which must be read) and in the Supplementary Report. Nonetheless, I shall summarize my own answers to those questions here.

A. To what extent can the judge depart from the Guidelines? The simplest way to answer this question is to quote directly from the Guidelines' basic instruction on pp. 1.6 - 1.7. It says the following:

> The new sentencing statute permits a court to depart from a guideline-specified

sentence only when it finds "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission . . . ." 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third senctence of §5H1.4, and the last sentence of §5K2.12,

> list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

No one at this point can predict accurately how often sentencing courts will depart from the Guidelines or how often the courts of appeals will permit them to do so. The Commission will monitor the process and make appropriate adjustments in light of what it learns. I believe that in Minnesota, with a roughly similar guideline system, judges depart with respect to the prison/no-prison decision about 11 percent of the time, and with respect to length of sentence about 7 percent of the time. The State of Washington, with another roughly similar guideline system, has experienced a somewhat lower departure rate.

B. Where do the Guidelines' words, distinctions, and numbers come from? The short answer to this question is that many of them rest upon "existing practice." The Commission made two key decisions late last year when it decided to use what is basically a "charge offense" sentencing system and to rely heavily upon existing sentencing practices as a starting point for drafting. The reasons why it made these decisions are set out in some detail in Chapter One of the Guidelines.

The Commission tracked existing practice in three specific ways. First, the language it used to describe offenses simply summarizes existing statutory provisions. Thus, the Commission simply assigned "base offense levels" to crimes already defined by statute.

Second, the Commission decided which "specific offense characteristics" to add to the basic description of each crime by examining those factors that now actually account for enhanced sentences for that crime. When we discussed robbery, for example, we used a document called the "cross tabulation," which the research staff developed after analyzing 10,500 actual criminal cases. That document (a page of which is in Appendix A) reveals that of 1,100 robbery cases, forty involved physical injury to the victim. We therefore included physical injury as a basis for increasing the sentence when it occurs in conjunction with a robbery. We did not use "death" as a specific offense characteristic with respect to robbery because a death occurred only 3 times in the 1,100 cases. Thus, death, when it occurs in conjunction with a charged robbery, will constitute grounds for departure.

Third, the Commission decided what numbers to use, what actual sentences to give, by beginning with present practice as determined through the research staff's analysis of 10,500 cases, as well as through the Parole Commission's Guidelines. Thus, when discussing robbery, for example, we could use staff summaries that stated after each proposed guideline level the number of persons now receiving a prison sentence (not probation) and the length of that sentence. (See Appendices B, D.) Summaries also showed the extent to which a specific offense characteristic (such as presence of a gun) increased sentences (on average) at present. (See Appendix C.) Data prepared by the Administrative Office of the United States Courts for frequently committed crimes showed not only mean time served, but also the distribution of sentences around the mean.

The Commission, however, did not simply copy past average practice. It made a series of policy judgments designed to help rationalize that practice, the most important of which can be understood by comparing page 28 with page 33 of the Supplementary Report. (See Appendix D.) You should note that, in present practice, prison sentences for theft are more frequent and longer than those for fraud involving similar dollar amounts. We could see no reason why this should be so, for fraud, after all, is simply another form of larceny, namely, larceny by trick. Thus, we made comparable the punishments for these and similar property crimes.

In sum, the numbers, distinctions, and categories originated with statutes and practices but were modified and rationalized by the Commission.

C. Has the Commission eliminated probation? The answer to this question is no. But, it is important to understand just how the Commission has modified existing probation practices.

At the outset I would like to mention a problem of terminology. The Sentencing Commission's definition of "probation" is provided by statute. Section 3563 of Title 18 provides that the conditions of "probation" may include residence at a "community corrections facility," 18 U.S.C. § 3563(b)(12), and prison confinement "during nights, weekends, or other intervals of time," 18 U.S.C. § 3563(b)(11). Rather than referring to such confinement conditions as "probation," the American Bar Association and others now describe such conditions as "intermediate sanctions." This terminological matter is important because the precise difference between present probationary practice and the Commission's approach appears at lower sentencing levels where the Guidelines impose short terms of non-prison confinement or intermittent confinement. It is the existence of these non-prison confinement conditions and the option of intermittent confinement that most significantly change present probationary practices.

To be more specific, the Guidelines apply the following rules with regard to a first offender. For offense levels 1 to 6, the Guidelines specify a minimum prison term of zero months and authorize the sentencing court to sentence the offender to probation unaccompanied by any confinement term. See §5B1.1(a)(1). For offense levels 7 to 10 (which carry minimum prison terms of one to six months), the court may substitute probation for a prison term, but the probation must include either intermittent confinement or community confinement or both. See §5B1.1(a)(2). The Guidelines define "intermittent confinement" as confinement "in prison or jail" during each day of which "the defendant is employed in the community and confined during all remaining hours." See §5C2.1(e)(1). They define "community confinement" as "residence in a community treatment center, halfway house or similar facility." See §5B1.4(b)(19). For offense levels 11 and 12, which have minimum prison terms of eight to ten months, the court must impose at least one-half of the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. See §5C2.1(d). At higher offense levels, the court may impose probation as a sentence only by departing from the Guidelines. In such cases, the court must provide its reasons, and the sentence will be subject to appellate review for "reasonableness." See 18 U.S.C. § 3742(d)(3).

To understand how these rules work in practice, consider three types of white collar property crime -- an area where the Commission meant the probation rules to have significant impact. Take first a simple embezzlement. A court is free to grant probation with no confinement term if the embezzlement is of $2000 or less (level 6). See §2B1.1. The court may impose probation with some form of confinement condition if the embezzlement is $50,000 or less (level 10). See id. The court may impose a split sentence if the embezzlement is $200,000 or less (level 12). See id. The comparable curve for tax evasion rises somewhat more quickly. Level 6 involves evasions of $2000 or less, level 10, $40,000 or less, and level 12, $150,000 or less. See §2T4.1. Antitrust violations have a base offense level of 8 if less than $1 million of commerce is involved. See §2R1.1. Level 10 involves commerce of up to $15 million, and all offenses involving more than $50 million are base level 12. See id.

At present, a sentencing judge in all cases of embezzlement, tax evasion, or antitrust violations may impose probation without any term of confinement. The Commission deliberately chose, however, except in the least serious cases (level 6 or less), to require some form of confinement -- either intermittent confinement, community confinement, or imprisonment -- for these white collar crimes. The Commission did so for two reasons: first, the Commission considers present sentencing practices, in which white collar criminals receive probation more often than other offenders who committted crimes of comparable severity, to be unfair; and second, the Commission believes that a short but definite period of confinement may deter future crime more effectively than sentences with no confinement condition. Because the Commission deliberately defined "community confinement" broadly, the Bureau of Prisons will have some freedom to shape probation programs to promote these goals of fairness and deterrence, as well as the goals of rehabilitation and counseling.

Thus, to some extent, the difference between present practice and the Guidelines' approach to the problem of probation reflects a different philosophy about the proper response to white collar crime. To some extent, however, the Commission's approach has been influenced -- if not compelled -- by the statute authorizing the Guidelines, which requires that the Guidelines prescribe sentencing ranges in which the maximum prison term exceeds the minimum term by no more than 25 percent. See 28 U.S.C. § 994(b). It would be anomalous to specify that a judge may sentence a kidnapper either to a prison term of 51 to 63 months or to no prison time at all. One might ask why, if the judge has the alternative of providing no confinement whatsoever, he lacks the alternative of providing a briefer term of confinement. To permit probation where the alternative is a long prison sentence, creates a bizarre discontinuity; the result would not be so much an "in/out" line, as an "in/out" cliff. The Commission's approach, comparatively speaking, has the virtue of a degree of modulation as one moves from less serious towards more serious offenses.

D. How will the Guidelines affect prison population? The answer to this question is contained in the Prison Impact statement, developed by our Research Staff with the assistance of personnel from the Bureau of Prisons and an outside consultant from the Massachusetts Institute of Technology. The study develops 20 different scenarios based on 20 different sets of assumptions. It finds that the Guidelines will increase prison population by somewhere between -2 percent and 10 percent with 6 percent being the most likely increase. This comparatively modest impact is consistent with the fact that the Guidelines, by and large, are based upon existing sentencing practices.

It is my understanding that the Research Staff has used conservative assumptions, assumptions that do not permit the model to understate the likely effect on prisons. Some critics, for example, seem to think that the Guidelines will not only increase prison population by 6 percent but will also increase the population of half-way houses and community treatment centers because of the more restrictive probationary confinement conditions. But that is not so. Those critics do not understand the model. The model counts each added month of probationary confinement as if it were a month of added prison time. Thus, the results reflect this impact. It is included in the -2 percent to 10 percent estimates; it cannot be considered an additional effect.

I should also add that even though the Guidelines will probably not increase prison population by more than 10 percent, our studies also show that long mandatory sentences in the new drug law, as well as the 'special offender' provisions in the new sentencing statutes, will increase prison population significantly. And, the problem is a serious one.

E. What do the Guidelines do about plea bargaining? Presently, about two-thirds of all federal criminal sentences involve some form of plea bargaining between prosecutor and defendant, either about charges, about a maximum recommended sentence, or about the specific sentence to be given. The initial Guidelines will not radically alter this practice. They will permit he Commission to study it, however, and to act appropriately in the future.

Under the Guidelines (Chapter Six) the prosecutor and defense counsel must accurately state the full facts of the offense to a probation officer. The probation officer must then prepare a report describing offense and offender that he gives to the sentencing judge. When the parties enter into a plea agreement, the judge will have (1) the probation officer's report, (2) the proposed agreement, (3) the parties' explanation of why the agreement should be accepted, and (4) the Guidelines that show the judge the sentence to be imposed if he does not accept the agreement. The judge, under Rule 11 and Chapter 6 can accept an agreement that departs from the Guideline range for "justifiable reasons." Thus, the judge is likely (1) to be more aware of the true facts, (2) to have a better understanding of the reasons for the agreement, and (3) to have a standard for comparison of sentences. By focusing on the judge's reasons for accepting plea agreements, the Commission will be able to study the practice systematically.

F. Will the Guidelines significantly increase the power of the prosector? Although I have heard critics claim that "charge-based" guidelines will enhance the power of the prosecutor to determine the ultimate sentence, I am not certain just how this can be so. I cannot find many significant differences between the prosecutor's present powers and his future powers under the Guidelines.

Under the Guidelines, the prosecutor can increase a sentence by adding charges, but the same is true today. And, the fact that "charge bargaining" exists today suggests that many judges really do increase a sentence to reflect additional charges. Of course, today the judge can refuse to increase the sentence to reflect the added charges, but the same is true under the Guidelines; and, under the Guidelines, as today, the judge is likely to refuse to provide an additional sentence where the charge suggests unfair prosecutorial conduct. In fact, under the Guidelines, unlike today, the "multiple offense" rules will limit the extent to which "more counts" means "more prison."

Under the Guidelines, the prosecutor and defendant can enter into a plea agreement; the prosecutor can encourage a plea agreement by pointing to the additional charges he might bring if the case goes to trial. But, again, the same is true today. Were the Guideline sentences significantly longer than present sentences, one might argue that the pressure upon the defendant to enter into a plea agreement had increased. But, the Guideline sentences are not significantly longer. Thus, how can one claim additional pressure to bargain (except, of course, in the drug area where longer sentences reflect mandatory minimums in the new statute)?

Finally, one might argue that the prosecutor has the power to refuse to point out certain key factors (such as the presence of a gun) to the court, thereby reducing the sentence that the court would otherwise impose. But, again, the same is true today. Indeed, the Guidelines' obligation of full disclosure, the requirement of a probation report, and the increased statutory authority given the judge to control the actual sentence served -- all should give the judge comparatively more power under the Guidelines and the prosecutor comparatively less.

G. Will the Guidelines diminish the procedural protections available to the defendant? Under the Guidelines, an offender may find his punishment enhanced because of certain facts, say, victim injury or the amount of money taken, that were not at issue during his trial. The judge, rather than the jury, may determine those facts at a less formal sentencing hearing, held after the jury trial, and the judge will apply a lesser ("preponderance of the evidence") standard of proof. Some critics have pointed to this fact and claimed that the Guidelines diminish procedural protections.

These critics are wrong, however, for, in this respect, the Guidelines offer better protection than the status quo. The factors in question (e.g., injury to victim, etc.) are the very factors that lead judges to enhance punishment today. And, today (unlike tomorrow under the Guidelines) the judge may do so without any procedural protections for the defendant at all. Of course, the defendant today can ask the judge to hold an informal hearing about facts that he disputes in the presentence report, but such a hearing offers no "jury-trial" type protections. And, if the judge refuses to hold a hearing by stating, for example, that he will disregard a fact, the defendant cannot be certain whether or not the "disregarded fact" nonetheless plays a psychological role in the final sentence. In opening up and regularizing the existing sentencing process, the Guidelines take a major step towards, not away from greater procedural (as well as substantive) fairness.

IV

Let me turn now to the Commission's agenda for the future. The Commission is a permanent body; it has developed what it sees as an evolutionary (not a revolutionary) Guidelines system. During the next few years, it must accomplish the following.

First, the Commission, together the Federal Judicial Center, is teaching, and will continue to teach, the Guidelines system to probation officers, judges, and other members of the criminal justice community. Doing so involves training sessions, training manuals, an 'expert' computer program for use in each district court, a 'hot line' to the Commission staff, and assistance to organized bar groups.

Second, the Commission will monitor the Guidelines' application in the district courts and courts of appeals. Doing so will involve keeping track of (1) judicial interpretations of the Guidelines; (2) the extent of, and reasons for, departures (and related decisions in the courts of appeals); (3) the extent of, reasons for, and judicial treatment of, plea agreements; (4) the effect of the Guidelines on the populations of prisons, community treatment centers, and half-way houses; and (5) the extent to which Guideline application requires significant additional judicial, or other, resources. As a result of its monitoring, the Commission may revise guidelines or seek changes in its legislation, as appropriate. The Commission intends to maintain liaison with interested staff of congressional committees, as well as with bar groups and others in the criminal justice community.

Third, the Commission will begin a longer term research program aimed at systematic examination of (1) the affect of the Guidelines upon sentencing disparity; (2) their actual or potential effects upon such traditional crime control objectives as deterrence or incapacitation; and (3) the use of punishments that do not involve confinement in traditional prisons. (In my own view, a nationwide survey and evaluation of the use of work camps, half-way houses, and other nonprison punishment methods, would help the Comission to develop a more cost/effective system of punishments that could, in turn, help the Congress deal with the prison population problem.)

Fourth, the initial Guidelines explicitly deal with about 800 federal statutes. These statutes cover almost all federal prosecutions. They represent five to eight times as many statutory crimes as are the subject of typical state guidelines, such as those in Minnesota or the State of Washington. Nonetheless, there remain federal statutes which the Commission set to the side during the past eighteen months of work. It will begin to write guidelines for them. It will also begin further work with fines and with corporate sanctions.

APPENDIX A

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Crosstabulation:     OFFICODE, AO OFFENSE CODE
                     By DEATH

              Count  |NO DEATH|DEATH    |
DEATH->     Row Pct  |        |         |   Row
                     |    0.0 |     1.00|  Total
OFFICODE    ---------+--------+---------+
                 100 |     3  |     25  |     28
  MURDER, 1ST DEGR   |  10.7  |   89.3  |    1.0
                     +--------+---------+
                 200 |     4  |     33  |     37
  MURDER, 2ND DEGR   |  10.8  |   89.2  |    1.3
                     +--------+---------+
                 300 |     1  |     25  |     26
  MANSLAUGHTER       |   3.8  |   96.2  |     .9
                     +--------+---------+
                 301 |        |      1  |      1
  MANSLAUGHTER OFF   |        |  100.0  |     .0
                     +--------+---------+
                 310 |        |     31  |     31
  NEGLIGENT HOMICI   |        |  100.0  |    1.1
                     +--------+---------+
                 311 |     2  |         |      2
  NEGLIG HOMICIDE    | 100.0  |         |     .1
                     +--------+---------+
                1100 |  1007  |      3  |   1010
  BANK ROBBERY       |  99.7  |     .3  |   36.6
                     +--------+---------+
                1200 |    49  |         |     49
  POSTAL ROBBERY     | 100.0  |         |    1.8
                     +--------+---------+
                1400 |    51  |         |     51
  OTHER ROBBERY      | 100.0  |         |    1.8
                     +--------+---------+
                1500 |   223  |     10  |    233
  AGGRAVATED ASSAU   |  95.7  |    4.3  |    8.5
                     +--------+---------+
                1501 |     2  |         |      2
  ASSAULT/GOVT OFF   | 100.0  |         |     .1
                     +--------+---------+
                1600 |    45  |         |     45
  OTHER ASSAULT      | 100.0  |         |    1.6
                     +--------+---------+
                1601 |     1  |         |      1
  ASSAULT GOVT OFF   | 100.0  |         |     .0
                     +--------+---------+
                2100 |    99  |         |     99
  BANK BURGLARY      | 100.0  |         |    3.6
                     +--------+---------+
                2200 |    25  |         |     25
  POSTAL BURGLARY    | 100.0  |         |     .9
                     +--------+---------+
                2300 |    13  |         |     13
  INTERST COM/BURG   | 100.0  |         |     .5
                     +--------+---------+
                2400 |    67  |         |     67
  OTHER BURGLARY     | 100.0  |         |    2.4
                     +--------+---------+
                     |    49  |         |     49
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APPENDIX B

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GUIDE Section	LEVEL	OFFENSE	EP55IS	USPC	OFFENSE CHARACTERISTIC #1	OFFENSE CHARACTERISTIC #2
B222	17	BURGLARY OF OTHER STRUCTURES	-	23	Value $1,000,001-5,000,000	
B222	17	BURGLARY OF OTHER STRUCTURES	-	23	Value $250,000-1,000,000	Firearm/Destructive Device/Controlled Substance*
B222	17	BURGLARY OF OTHER STRUCTURES	-	23	Value $250,001-1,000,000	Firearm/Destructive Device/Controlled Substance
B222	17	BURGLARY OF OTHER STRUCTURES	-	23	Value: $1,000,000-5,000,000	
B222	17	BURGLARY OF OTHER STRUCTURES	-	23	Value: $1,000,001-5,000,000	
B222	18	BURGLARY OF OTHER STRUCTURES	-	23	Planned	Value: $250,001-1,000,000
B222	18	BURGLARY OF OTHER STRUCTURES	-	23	Value $1,000,001-5,000,000	Firearm/Destructive Device/Controlled Substance
B222	18	BURGLARY OF OTHER STRUCTURES	-	23	Value: over $5,000,000	
B222	19	BURGLARY OF OTHER STRUCTURES	-	23	Planned	Value $1,000,001-5,000,000
B222	19	BURGLARY OF OTHER STRUCTURES	-	23	Value Over $5,000,000	Firearm/Destructive Device/Controlled Substance
B222	20	BURGLARY OF OTHER STRUCTURES	-	23	Planned	Value over $5,000,000
B223	04	TRESPASS	-	4		
B223	04	TRESPASS	-	4	Secured Government/Nuclear Facility or Residence	
B231	18	ROBBERY		18-20		
B231	19	ROBBERY	-	18-20	Firearm/Destructive Device/Controlled Substance	
B231	19	ROBBERY	21 (99%)	18-20	Value $2,500-10,000	
B231	20	ROBBERY	-	23	Bodily Injury	
B231	20	ROBBERY	22 (92%)	18-20	Value $10,001-50,000	
B231	20	ROBBERY	-	18-20	Value $2,500-10,000	Firearm/Destructive Device/Controlled Substance
B231	21	ROBBERY	-	23	Bodily Injury	Firearm/Destructive Device/Controlled Substance
B231	21	ROBBERY	-	18-20	Firearm Possessed But Not Used Nor Discharged	
B231	21	ROBBERY	-	18-20	Value $10,001-50,000	Firearm/Destructive Device/Controlled Substance
B231	21	ROBBERY	-	23	Value $2,500-10,000	Bodily Injury
B231	21	ROBBERY	22 (92%)	23	Value $50,001-1,000,000	
B231	22	ROBBERY	-	23	Abduction	
B231	22	ROBBERY	-	18-20	Firearm Used But Not Discharged	
B231	22	ROBBERY	-	25-27	Serious Bodily Injury	
B231	22	ROBBERY		23	Value $10,001-50,000	Bodily Injury
B231	22	ROBBERY	-	23	Value $50,001-1,000,000	Firearm/Destructive Device/Controlled Substance

APPENDIX C

Estimated Level Adjustments: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time.

Table 1(b) -- Change in Sentence Level

	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1	0	1	2	3	4	5	6	7	8	9	10
Weapon: present or used																					
Theft															XXX	XXX					
Burglary													XXX	XXX							
Robbery														XXX	XXX						
Heroin														XXX							
Cocaine														XXX							
Homicide (did not use)							XXX	XXX													
Rape														XXX	XXX						
Additional Planning Involved																					
Robbery												XXX									
Embezzlement											XXX	XXX									
Fraud												XXX									
Illegal immigration											XXX	XXX									
Organized Crime Involved																					
Income tax															XXX	XXX					
Cooperation																					
Cocaine									XXX												
Marijuana								XXX													
Fraud									XXX	XXX											
Heroin									XXX												
Embezzlement									XXX	XXX											
Def. was a drug user																					
Theft													XXX	XXX							
Auto Theft														XXX	XXX						
Burglary													XXX	XXX							
Heroin (sales)										XXX											
Cocaine (sales)									XXX												

Note: XXX represents the range of sentence levels increased (+) or decreased (-) when a factor is present.

APPENDIX D(1)

Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time

Table 1(a) -- Sentence Levels

Baseline Offense	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	Estimated % Sentenced To Prison
Kidnapping, involving:																															
Extortion																									X						99
Rape																										X					100
Other																								X							97
Theft, Unsoph																															
$300/less								X																							50
$301/4,000									X																						56
$4,001/50,000										X																					67
$50,001 +											X																				73
Theft, Soph																															
$2,000/less										X																					66
$2.001/20,000											X																				74
$20,001/175,000												X																			80
$175,001/1 M													X																		86
$1 M +														X																	95
Auto theft, single event																															
Less Culpable							X																								50
Def. acted alone									X																						72
Def. Leader											X																				85
Auto theft multiple event																															
Less Culpable							X																								60
Def acted alone										X																					80
Def. Leader											X																				85
Auto theft, ongoing																															
Less Culpable									X																						76
Def. acted alone												X																			90
Def. Leader													X																		93
Burglary																															
single event												X																			86
Multiple events														X																	96
Counterfeiting, not ongoing																															
$500/less								X																							63
$501/33,000									X																						74
33,001/250,000										X																					82
$250,001/1 M											X																				86

Note: X indicates the estimated sentence level (see text) for the corresponding offense.

APPENDIX D(2)

Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time

Table 1(a) -- Sentence Levels

Baseline Offense	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	Estimated % Sentenced To Prison
Civil rights, involving:																															
Election laws															X																85
Arson														X																	80
victim injury																X															87
Victim death																									X						100
Other												X																			61
Smuggling illegal aliens		X																													50
Fraud, Unsoph																															
$500/less				X																											16
$501/3,500					X																										39
$3,501/8,000 or no loss						X																									47
$8,001/50,000							X																								55
$50,001 +								X																							80
Fraud, Soph																															
$10,000/less							X																								30
$10,001/60,000 or no loss								X																							65
$60,001/400,000									X																						74
$400,001 +										X																					82
Perjury																															
Concerning self or others									X																						45
Concerning self and other											X																				66
Extortion/Blackmail Nonmonetary													X																		75
Extortion/blackmail Monetary																															
$20,000/less												X																			37
$20,001/50,000													X																		76
$50,001/1 M														X																	79
$1 M +															X																90

Note: X indicates the estimated sentence level (see text) for the corresponding offense.

Senator KENNEDY. Thank you very much. I have some questions, but we have a number of the members of the panel here. I will either ask them afterwards or submit them.

I recognize the Senator from Arizona.

Senator DECONCINI. Chairman Kennedy, thank you very much. I do have a statement. I would ask that it be put in the record at the beginning.

Senator KENNEDY. It will be put in the record.

Senator DECONCINI. I apologize for not being here. Congressman Hoyer and myself are holding hearings on some people who have been released from the Soviet Union, from the Ukraine and Georgia Republics just downstairs. That is why I could not be here.

I do have an area that I would like to pursue for a moment, if I can, Mr. Chairman, with Judge Breyer. Judge, we welcome you here. As you know, the committee has never been the same since you left. It will never be as fine and precise, even with the great staff that we have, as when you ran it.

First, let me say that my statement goes into praise of the Commission's efforts here. I compliment you for the tremendous work you have done. I have read and reviewed the guidelines and I have talked to judges in Arizona. There are some problems with the guidelines but overall it is a good thing. It is a right thing. You have followed what Congress asked you to do.

What concerns me, Judge Breyer, is that you have said you can teach all of this in 2 hours, and Federal judges are going to have 2 days of training. In all due respect, in talking to some judges around the country, there was some effort to try to delay—not to postpone, not to reverse, and not to alter—but to delay the implementation because of concerns of being able to really understand and to have an appreciation and to have the time to educate themselves.

I would like your comments, Judge Breyer. Obviously, you think 2 hours is enough for judges to do this. Maybe judges in the Northeast have higher intellect or greater capacity than those in the West, but I wonder if you have really thought what kind of phase-in there is and what kind of a program ought to be implemented to try to phase this in, when the courts all over this country are just inundated. Now they have very important guidelines to learn. I am concerned about the time.

Judge BREYER. I think that is a legitimate concern. Initially, the Commission wanted to delay implementation for two reasons. The first reason is that this is a big document. We worried, whether there were bugs, glitches, technical mistakes, that we need the time to find and to correct.

Over the summer, our worries lessened because not many technical mistakes appeared, and the ones that did appear we found we could correct by clarifying the commentary.

Your main concern, however, is the one that still exists, which is in respect to training. There are training programs set up. Judge Mazzone will discuss those with you. The judges and probation officers will receive 2 days of intensive training and possibly more. If I can draw upon my own experience in teaching I would say two things. First, it is possible to learn complex legal matters fairly quickly when necessary. You passed an immigration law that is very complex. The judges must learn that, as must every manufacturer and businessman. You have passed a Bail Reform Act. You have revised the tax law. Judges will learn all the new legislation. They do not always need delays to learn new complex matters.

Second, very often people who are busy—it is true in my preparation for these hearings—begin to focus on the problem a few days or maybe a week or two weeks before the final deadline.

I think if there were a perfect world, one would have more elaborate teaching programs, and one would have 3 or 4 months in which to prepare. Every judge would go to the teaching programs and study the first 12 guideline pages, reading them twice, and study Judge Tjoflat's procedural documents and read through the guidelines and also look at those numbers to see how they compare with present practice in the Report. One would do that for several months in advance. But the world is not perfect, and there are a lot of considerations, particularly legislative ones which you know better than I.

I think that if the guidelines go into effect on November 1, the judges will be able to handle them. They will be able to educate themselves and to learn from others.

Senator DECONCINI. Judge Wilkins, if I could ask for your comments. I notice on Page 8 of your statement you state that the Commission decided to apply the guidelines prospectively to crimes occurring on or after November 1 in order to provide a natural phase-in of the guidelines. You state that the transition period will accommodate further training, et cetera.

Later today, we are going to hear testimony from several people who believe that the few days we have before these guidelines go into effect is inadequate to train for the phase-in of the guidelines because the delay between, say, indictment and sentencing is minimal in some of the cases. In addition, those few days of delay will be used for pre-sentencing investigations, which is another process requiring working knowledge of the new guidelines.

Can you comment on that? Maybe you just want to ditto Judge Breyer, but I know you by reputation and the hard work you have put in here. I would like your observations of whether or not we really are being fair to make sure these succeed by imposing them in just a couple of days on all judges.

Judge WILKINS. Thank you, Senator.

First of all, in anticipation that a delay or stay of implementation of the guidelines would not be granted by the Congress, the Commission—working with Judge Mazzone, the Education Committee and the Judicial Center—months ago began a training and education program. That program is in effect now. In fact, we have just completed a training session in Dallas. Next week, we start in Denver.

At the conclusion of next week's training session, there will be trained at least one, and many times two, probation officers from every judicial district in the United States; and there will be about 45 percent of the districts that will have been represented by a district judge. All were invited to come. It shows 100 percent of the districts are sending a probation officer or two and about 45 percent in addition to that are sending a district judge.

Then we have prepared with the Judicial Center in conjunction a training packet of material and videotape, and those individuals then go back to their respective districts and conduct training programs there. The Commission staff will assist in that as our resources and staff will allow.

So I do think that more time would be certainly nice to have, and I certainly advocated a short period of time for training and education. But once the House spoke with such an overwhelming voice in defeating that bill, I think now that further——

Senator DECONCINI. Did the Commission recommend more time? I have forgotten.

Judge WILKINS. The Commission initially last year recommended a period of time for training and education. But since that time, some commissioners thought that it was unnecessary to have a delay; others took a contrary position.

Senator DECONCINI. Judge, did the Commission seek any kind of input from the judges across this country as to what they thought there should be more time? If so, can you share with us what the opinion was?

Judge WILKINS. I think the feeling was overwhelming that more time would be necessary. But I think a lot of that has changed now because those who have attended these training sessions realized that the training is first class. It is not 2 days. It is intensive training, 4 days of training, and then those individuals go back and conduct the training programs themselves. I think it will be sufficient.

Now, you mentioned the application of the guidelines, and there is legislation the Commission has recommended to this committee be passed. It is probably the question most often asked of us. To whom do these guidelines apply? Individuals who commit crimes before November 1st but are sentenced after November 1st, or those who commit crimes after November 1st?

It is the Commission's position that reason and fairness and perhaps the Constitution would say it applies only to conduct committed after November 1st. I understand that is also the position of the Department of Justice. That will provide a slow, gradual implementation of the guidelines because crimes committed after November 1st will not reach the courtroom, and certainly the sentencing phase, for, many times, many months. Certainly, it will take 6 months for it to have even a majority of the cases being sentenced under the guidelines.

Senator DECONCINI. Thank you, Judges. My concern here is that you answer the question. I thought that was the answer. The judges overwhelmingly wanted more time, and I think we are awful foolish in Congress to ram it down their throats. But that is the judgment that we are going to make, I guess. Fortunately, we have a judiciary in this country that undoubtedly will respond. It just seems to me that we in Congress ought to be a bit more sympathetic to the time constraints and the caseloads of our judges, particularly when there was no movement here to reverse this or to delay it indefinitely. We were just trying to ask for some time.

It is the will now that we are going to go ahead with it. Of course, we want to wish you all well. I do compliment the Commission for your efforts. Yet, I do wish you had taken a poll and shared it with us about the feelings of the judges, or a survey, and spoken a little bit stronger yourselves. But that is just my own opinion.

Thank you, Mr. Chairman.

Senator **Kennedy**. The Senator from Iowa.

Senator **Grassley**. Mr. Chairman, I want to put a statement in the record.

Senator **Kennedy**. The statement will be printed in its entirety in the record.

Senator **Grassley**. Thank you.

Since I am relatively certain that the recent House action means that the sentencing guidelines will not be delayed, I would like to ask if any changes should be made in the guidelines before November 1, 1987? I would appreciate it if you could give me some idea of the two or three most important changes that ought to be made in the guidelines, short of delay?

Commissioner Nagel, would you please answer that for me?

Commissioner **Nagel**. Unfortunately, Senator, I do not have a copy of the bill in front of me, but I think that just speaking from memory——

Senator **Grassley**. Well, have you established a priority? Have you ranked the necessary changes, beginning with the ones that are most necessary, and ending with those that may not have a broad consensus?

Commissioner **Nagel**. I think one of the most important amendments that should be passed, if the Senate sees fit, is the one Judge Wilkins just referred to which has to do with the statement that the guidelines will only apply to those offenses committed after November 1. That is just a clarifying amendment.

The second one I believe is Section 103, although I am not sure. As I say, I do not have the bill in front of me. But it has to do with the clarification of the departure language. I believe Senator Kennedy's staff and Senator Biden's staff have marked up a bill with a change in the language for the provision of departures. I think that the Commission took a vote on Tuesday of this week. I believe that vote was unanimous in favor of the amended language.

Those would be the two that I think would be the most important.

Senator **Grassley**. Judge Breyer, other than the ex post facto issue, do you see any other constitutional challenges to the guidelines?

Judge **Breyer**. Senator, there will undoubtedly be constitutional challenges. There is an issue in respect to the separation of powers. There is a constitutional question as to whether Congress can delegate to a group of judges working with people who are not judges, the power to create rules with some substantive connotations. That is a very important and interesting legal question. The Supreme Court undoubtedly will decide it. It is similar to the question you are familiar with; in the Gramm-Rudman—Bowsher vs Synar—lose.

Senator **Grassley**. What, if any, problems are contemplated by having the Bureau of Prisons take over the responsibility for administering the parole laws? Do we open up the Federal Government to potentially significant lawsuits with that change?

Judge WILKINS. I do not think so. That is a proposal by the Department of Justice. The Commission, of course, would not be affected one way or the other and has taken no position on that bill. As I understand it, that would apply only to inmates who are in prison under the old system, 5 years from now, when the parole commission is finally dissolved. So we are talking about very few individuals, I believe.

I would rather not speak to that, Senator, and have the Department of Justice, because that is not something the Commission has—we do not necessarily oppose it. We just simply take no position since it has no effect on our work.

Judge BREYER. Senator, the particular amendments are a series of technical amendments which we think are supported by consensus, indeed the Department of Justice. The one that was the most questionable involved the departure language. I think there is a consensus now on that too. I think the department agrees to the language we worked out with them.

Senator GRASSLEY. Mr. Chairman, I will submit additional questions in writing.

Senator KENNEDY. Fine.

Senator GRASSLEY. And I would like to have permission to leave questions for the American Bar Association.

Senator KENNEDY. They will be so included, and the responses will be made a part of the record.

The Senator from Wyoming.

Senator SIMPSON. Thank you very much, Mr. Chairman. I welcome the members of the Commission who are testifying, and other witnesses.

As we consider this issue of possible delay in implementation which deserves this hearing, I compliment you, Mr. Chairman, because I have had a great deal of comment from members of the Bar in Wyoming and Federal judges in Wyoming. I will be particularly interested in hearing and reviewing the record—and I really will on this one. We always say that, you see. But I really will on this.

We have three Federal judges in Wyoming, and all three have contacted me directly and expressed their deep concern about the implementation as scheduled. Additionally, the Wyoming State Bar en masse, at their convention assembled, passed a resolution expressing their concern about implementation of the guidelines without further review as to the impact.

I do very much support the role of the guidelines, and I have in the past with respect to the crackdown on drug dealers and violent offenders and recidivists and white-collar crime, especially that area of white-collar crime. I think it is an important goal to reduce the disparity of sentences among those criminals and to support the purpose of the Crime Control Act and the Sentencing Reform Act which most of us voted for and supported.

I heard your beseeching voice, Judge Breyer. You were a superb counsel here for Senator Kennedy when he was Chairman in my first year in the United States Senate. It has been a pleasure to watch your professional conduct, and you have had a fine tenure on the bench. I was listening. I was in this room and did hear what you were saying.

At the same time, we need to deal with the realities of a State like the one I represent with 460,000 people in it. I was at one time a U.S. Commissioner, now U.S. Magistrate, I believe is the phrase, and I know the importance of being able to deal on an individual level with attorneys and defendants that come before the Bar and the Federal criminal system. It is an intimate type of personal practice. In fact, Judge Kerr, the senior judge, told me to quit writing letters of character reference for people I had bound over, because I knew them. I knew that Sheila did not mean to take $5.62 from the postal drawer, but she did and she went down the road.

So those are things that I have to grapple with. I do not want to be part of any delay, but I have a bundle of sincere and direct questions coming from Wyoming judges and trial lawyers in a State where we have a real affinity for the personal practice of law, a practice which is quite unique, perhaps, to my State in many respects. Programs that are destined to require big city judges to slap guys in the slammer do not always find a convenient application in a rural setting.

I will be most interested in receiving the testimony, weighing it and working to obtain the results that we all sought, Mr. Chairman, when we supported the original legislation. I really will be interested in hearing and reading all of this so that we can come to that good result.

Mr. Chairman, I will submit my questions in writing, and thank you for this opportunity.

[The information of Senator Simpson follows:]

RESPONSES TO QUESTIONS OF SENATOR SIMPSON

Question 1

If the Congress were to vote to delay implementation of the Sentencing Guidelines, how can we be assured this delay would be used for its alleged purpose, that is to increase education among the judicial branch and smooth the flow of transition from the old system to the new system? Or, to ask the question differently, how can we be sure that delay is not actually intended to ultimately prevent any implementation of the Guidelines?

Response to Question 1

The Commission has worked closely with the Federal Judicial Center to develop training programs for the "Federal Courts family." We intend to press forward with the implementation of these training programs, whether or not Congress were to delay the implementation date for the Guidelines. Arguably, if some delay were provided, more thorough and complete guidelines education programs for all guideline users, including federal prosecutors and defense attorneys, could be accomplished before the Guidelines become operational. Those who have argued for delay have stated that their motives are entirely well-intentioned, but, of course, there can be no guarantee regarding what might occur in the future should Congress follow those recommendations.

Question 2

As a matter of practicality, I understand that the Sentencing Guidelines would result in a tremendous increase in the population of federal prisons. Where are we going to put these prisoners? What is the Commission's analysis of the impact on federal prisons?

Response to Question 2

The Commission does not foresee a substantial effect upon prison capacity arising directly from implementation of the Guidelines. However, the Commission does project a substantial impact on prisons as a result of other factors, such as increased prosecution trends, the Anti-Drug Abuse Act of 1986, and the "cover offender" provision in the Sentencing Reform Act of 1984 which the Guidelines must implement. The Commission will continue its cooperative prison impact study with the Bureau of Prisons in order to be in a position to make recommendations regarding the number and types of prison facilities which current projections indicate will be needed.

Question 3

What is your opinion on the potential impact of the Sentencing Guidelines on court and court related personnel?

Response to Question 3

We are not in a position at this time to project, with any degree of precision, the impact of the Guidelines on the federal courts, probation officers, and other court-related personnel and resources. However, the Commission has tried to be sensitive to these concerns as it developed the Guidelines. It seems reasonable to expect that there will be a significant impact on the Probation Division and probation officers as a result of the enhanced responsibilities given to probation officers under the Act. There are, of course, some offsetting considerations.

At the Federal District Court level, we believe it is too early to assess whether the Guidelines will or will not result in more trials. Sentencing proceedings necessarily will be somewhat more time consuming, but we do not believe that is necessarily an undesirable thing.

Because the Act for the first time confers a right to appeal a sentence, it can be expected that the workload on the appellate courts will significantly increase. It appears to be too early to say, however, what the impact of this workload increase will be in terms of additional judgeships and other court positions.

Question 4

Do you expect that there will be a constitutional challenge to the establishment of the Guidelines? If so, what do you forecast as the outcome of such a challenge?

Response to Question 4

We do expect constitutional challenges to the Sentencing Guidelines which will no doubt have to be resolved by the U.S. Supreme Court. Although the questions are of a serious nature, we are reasonably confident the Guidelines will be upheld.

Question 5

How will flexibility be maintained for the discretion of judges in very different geographic areas of the United States? That is, will there be any latitude for a federal judge in Wyoming to deal on a more personal level with sentences and criminal defendants, as opposed to the "big city" federal judge who does not have this luxury?

Response to Question 5

The Guidelines do not explicitly provide for variation in the application range due to the geographical location where the offense occurred. While the Commission considered this facator, we did not build it into the Guidelines due to the overriding national objective of achieving greater uniformity in sentencing for similar crimes and offenders, due to possible "equal protection" concerns, and other reasons. Nevertheless, the flexibility of the departure standard should provide judges with sufficient leeway to individualize sentences as appropriate.

Question 6

Please indicate in your analysis of Question 5 the impact of the proposed technical amendments currently under consideration.

Response to Question 6

To the extent the departure standard is further clarified as we have suggested, it should enhance the ability of the courts to individualize sentencing where appropriate.

Senator KENNEDY. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I join my colleagues in complimenting you on a prodigious job and an outstanding job; it is massive and so very, very important. We thank you for it. Sentencing is the toughest part of the criminal process and has long been overlooked, and these changes are long overdue.

With respect to the time issue, I am sympathetic to the delay; and notwithstanding the action of the House, speaking at least for myself, I would be inclined to grant the delay and see if we cannot work it out. Congress has a way of doing things in a hurry when it sets out to do so, makes up its mind to do so.

I have just a couple of brief questions, and I will not take long because we have other panels to follow. I would be interested in—and perhaps if this has been covered it can be abbreviated now—the impact on prisons. Many of us here today have been very concerned about prison overcrowding and what is going to happen. Judge Breyer, I know you addressed this subject in your written statement. How much additional load will this place on the Federal prisons?

Judge BREYER. We have worked out in this document, Senator, over prison impact statement based on 10,500 actual cases. A professor from MIT who has written books on the subject, Bureau of Prisons personnel, and our own computer personnel worked on it. It made 20 different sets of assumptions, in respect to plea bargaining, departures, the crime rate, etc. And given 20 different sets of assumptions, so we have 20 different numbers. All of which fall within the same range.

Senator SPECTER. How about an assumption that judges are going to get tougher on sentencing?

Judge BREYER. If you assume that—fewer departures et cetera—the effect is plus 10 percent on the prison population due to the guidelines. If you assume more leniency and negotiation, et cetera, the guidelines—and that could happen because the mandatory minimums in the drug laws will raise sentences above what they are now perhaps leading to more plea bargaining—the effect of the guideline is minus 2 percent. If you use what is the most probable effect? The middle of the range is about 6 percent.

That result is over and above what will happen anyway. The drug law with the mandatory sentence is going to increase prison population a lot anyway. The special offender provision, which is mandatory, will increase it more. Then on top of that, you get, say, roughly anywhere between minus 2 to plus 10, roughly 6 percent, in numbers.

Take the numbers. I will not have them exactly right, but, say, roughly. There are 40 to 50 thousand prisoners now in the Federal system, and say just because of the things I talked about other than the sentencing guidelines, that could go up to a hundred thousand or more in 15 years. Then on top of that, the guidelines would be responsible for somewhere between an additional 3,000 maybe to an additional 7,000. So you are talking somewhere between 3,000 to 7,000 extra prisoners if you take a snapshot of the prisons, and you are talking about a time when the prisons may have a hundred thousand population anyway.

That is a rough picture of the range of ballpark figures which you will see in detail here of what these guidelines are likely to do to prison population. My own personal view is the result will be on the lower side of the estimates because of the drug law factor that I just mentioned. Anyway, the report statement is the view of the professionals if that is helpful.

Judge WILKINS. Senator, Commission Block was in charge of the prison population impact study. He may wish to comment on that.

Commissioner BLOCK. Thank you. I would.

Senator, by way of addition to Judge Breyer's statement on prison impact, I think it is important to recognize and re-emphasize the magnitude of the prison population that will be there independent of the Commission's action. We are talking about the prison population five years from now somewhere between 70 and 80,000. The Commission's contribution to that, by our best forecasts, are somewhere between—as Judge Breyer said—three and seven thousand.

Now, of that three to seven thousand, somewhere between a half a three-quarters of that impact will be in community confinement. What impact the Commission has will basically be in the area of community confinement. They will be the short sentences in the non-maximum security prisons. The expensive part of the implementation of the guidelines is really the part that is due to the drug abuse law and the career offender provisions, which will require much more prison capacity than our own changes due to the guidelines.

Senator SPECTER. Well, I realize that it is not easy to quantify or to predict. My own sense is that there is going to be a lot of extra sentencing coming out of these guidelines, and that if you add that to the drug laws and add it to the armed career criminal bill and the mandatory sentences generally, that the situation of the overcrowded Federal prisons is going to be greatly aggravated. I would just like to see those who are working in this area sound that alarm system because there needs to be a tremendous push to get Congress to do something about adequate funding for the prisons. We have enormous fiscal problems, and many of us have worked for a long time on this matter. Those of you on the Sentencing Commission, to the extent that you can help us in arousing public concern over the problem, I think it would be very useful. Because I think that these changes are necessary, but I do believe that it will result in very substantial additional sentencing. We just have to get ready for it.

I have a number of other questions, but I think I am going to reserve them for the subsequent panels. Thank you, Mr. Chairman.

Senator KENNEDY. Well, I want to express again my appreciation to all the members of the panel. I think the work you have done has been truly extraordinary. I think that has been the sense of the members of this panel here this morning, the cooperation, the reaching of consensus.

One of the matters which I know that you are giving some thought to you is the non-incarcerative possibilities. You have heard the expression about the crowding of prisons and what we are going to face down the road.

I would hope you would be able to enlighten us on what considerations you might have or what recommendations you might have as you give that some attention. I guess that a prison cell costs about $66,000, let alone what it costs to keep people in it.

I would certainly hope that you will be able to guide us as to what recommendations you might have in dealing with the problem. It is going to be very important. There just does not seem to be the desire or the will at any level to get the resources for those kinds of facilities. I think we need them.

We want to again express our appreciation to all of you.

Commissioner **MacKinnon**. Senator, you have talked about something other than incarceration. The Guidelines authorize sentences for probation, supervised release, restitution, fines, assessments, forfeitures, community confinement, home detention, community service and occupational restrictions. I think you will find, as sentences become shorter—in some of these cases we are now expanding them, white-collar crimes—that those will be subject to greater use.

Minnesota has been experimenting in this a great deal and may have 20 regional areas. Now, there are 3,200 Federal prisoners in halfway houses, 240 halfway houses, and I am sure that we are going to increase that in the Federal system.

So I think that the Federal system will eventually have to come, as they are trying to do, to more community confinement. Now, that is costly and they are running into objections from local zoning ordinances and things of that character.

The only other thing I would want to say is on delay. Somebody stuck me on this Commission, they said, because I had been a former U.S. attorney and I also have had eight years' experience when I first came on our court here with local crime, common crime, greater than any Federal court in America ever had. It was 50 percent of our local jurisdiction.

The sentence in each one of these cases will be a special problem just like any other legal problem in any case. And people will not become the great experts on sentencing that they think they have to be. They will learn how the system works, and they will work out a system just like they work out any legal problem in connection with a case. I am sure that the ingenuity of the Federal judiciary are up to that particular task, and they will do a credible job doing it.

Senator **Kennedy**. Well, that is certainly helpful. We appreciate your mentioning those thoughts. I am personally familiar with that Minnesota experience. I think it provides a lot of useful ideas.

We want to welcome Senator Metzenbaum. We have just concluded our first panel here of the members of the Commission. It was an excellent presentation. They responded to a number of questions. I think they could tell from the number of Senators that came and attended this hearing the broad interest that we have had. They have really done an extraordinary job. We will be glad to recognize you for any comments, if you would like.

Senator Metzenbaum. No. I am concerned about the issue. Does the Chair have any thoughts as to what action, if any, the Committee might take?

Senator Kennedy. Well, given the action of the House of rejecting any kind of delay, I think any legislative action is unlikely. I was very heartened by the comments by Judge Wilkins about the impact, that there has been some desire among the judges across the country for delay. And then after they went to the training sessions and had an opportunity to review it, many of their anxieties had been relieved.

I think the other point that I thought was instructive in the course of the hearings is that these guidelines are only going to apply to crimes committed after November 1st, which means that there will be a several-month effective delay before these matters will come before the judges for sentencing. It seems to me that with those two actions, hopefully some of the concerns that have been expressed will be relieved.

Senator Metzenbaum. I saw you the other day, Judge, with Senator Thurmond, I think.

Judge Wilkins. Yes.

Senator Metzenbaum. You had expressed great concern. Have you sort of changed your view on that a little bit?

Judge Wilkins. No. Back in April, the Commission thought it would be advisable to have a period for training and education. The problem is, until the guidelines go into effect, it is hard to get anybody's attention. So I was advocating, and I did in the House, a bill that says the guidelines are in effect, there is no more congressional review, but there would be a period of time for training and education. But knowing that that might not pass the Congress, all of us worked together to set up with the Judicial Center and Dave Mazzone who is here to testify a very good training program.

Now, more time would give us more time to do it, but I think there is sufficient time. It is an intensive program. It is ongoing today. We will be in Denver, Colorado, next week, and we will have experts in every judicial district trained within the next month. Then we will go back for additional training over the next several months to three months before the guidelines really go into effect.

Senator, I believe we will get it done. I think judges are focusing now very intensely on it. But the truth of the matter is delay is no longer an issue, and I would not support any delay effort at this time because I think it would simply impede the chance of passage of some very necessary legislation that we have been discussing with your staff over the past few weeks.

Commissioner Block. Senator, I might just amplify the implications of the prospective nature of the application of the guidelines. In doing the prison impact study, the research group looked at if these guidelines were applied only to crimes committed after November 1, '87, what will the number of cases actually look like during the first several months. The research staff has concluded that we would be lucky to have 50 cases where the guidelines will be at issue in November, and only a few hundred in the succeeding months.

So in the first three months of application, our research staff estimates that there would be no more than a thousand cases subject to these guidelines.

Given the fact that half of those will occur in 20 districts—cases are fairly concentrated—really the training effort looks up to the task.

Senator METZENBAUM. I want to commend you, Mr. Chairman, for holding this hearing because there has been a lot of confusion, postponement, postponement, nine months, six months, whatever. I think with the Commission appearing before us and saying they can live with it as it is, I think we put that issue to rest, and go right on from there.

Senator KENNEDY. Thank you very much. We will look forward to working with you. We appreciate the excellent presentation.

[Response to questions of Senators Biden and Grassley:]

RESPONSES TO QUESTIONS OF SENATOR BIDEN

Question 1

The Commission has proposed an amendment to Title 18, Sec. 3553(b) which changes the grounds upon which a judge may impose a sentence outside the range specified in the Guidelines. The present statute says that a judge may depart from the Guidelines only if the case before him contains a factor that was not "adequately considered" by the Commission in drafting the Guidelines.

a. How would the proposed amendment change this language, and why is such a change necessary?

b. The policy statements and commentary published along with the Guidelines contain some language regarding grounds for departure.[1] Notwithstanding the presence of such language, isn't it true that the only standard for departure is the standard set forth by Congress in the statute that we are discussing?

Response to Question 1(a)

The Commission's proposed amendment to 18 U.S.C. § 3553(b) would change existing law in two important ways. First, it would replace the "not adequately considered by the Commission" phrase with language which focuses the inquiry not on the sufficiency with which the Commission may have debated a given factor--a determination which is literally impossible for courts to determine without objective criteria--but, more properly, we believe, on whether such factor was or was not "taken into account" or "included" within the calculus of factors built into a particular Sentencing Guideline. Second, the Commission's proposal directs the courts, when making a determination under this subsection, to limit their consideration to the "four corners" of the Commission's published Guidelines, policy statements and commentary.

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[1] For example, in Sec. 5K2.0 the policy statement says, "the court may depart from the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate."

These changes are necessary to ensure that: (1) the departure provision works as Congress intended, (2) it is practical for the courts to apply, and (3) it does not result in a proliferation of discovery requests for background Commission documents and subpoenas of Commissioners and staff (in order to determine the adequacy of Commission consideration given to a particular factor).

Response to Question 1(b)

Yes. However, in its policy statements and, particularly, in the commentary accompanying Sentencing Guidelines, the Commission has frequently attempted to point out to the courts and litigants instances in which the Commission has not taken a particular factor into account in the Guidelines. Additionally, the Commission uses its commentary at times to indicate when a factor may have been considered in its usual form but not in a more extreme form. These are some of the situations which, consistent with the statutory language, the legislative history, and the Commission's expressed intent, may warrant departure from the otherwise applicable guideline range.

Question 2

Once the Guidelines go into effect, the Sentencing Commission will be required to propose any new Guidelines, or amendments to existing Guidelines, in a report to Congress. The report must be submitted between the beginning of the congressional session and the first of May, and the proposed changes would not go into effect until Congress has reviewed the report for 180 days.

In the proposed amendments to the statute, the Commission is seeking authority to propose interim, temporary Guidelines that would not be subject to these rules.

a. Why does the Commission need authority to promulgate temporary Guidelines?

b. How long would such Guidelines remain in effect without congressional review?

Response to Question 2(a)

The Commission envisions a very limited need for temporary guideline promulgation authority in three types of situations.

First, when problems in the application of existing Guidelines are brought to the Commission's attention--as some already have been during the intensive testing and training programs to date--the Commission would like to be in a position to respond more promptly with an appropriate guideline amendment remedy. Under the current law, the Commission can submit Guideline amendments to Congress only during the window between the convening of a congressional session and the first of May. Then, there is further delay, of up to 180 days unless Congress by law puts the amendments into effect sooner, pending congressional review of submitted amendments. The Commission would intend to limit its use of temporary guideline promulgation authority in these situations to amendments of an urgent nature where prompt action is needed to minimize application errors and accomplish the sentencing reform goals set forth by Congress.

Second, the Commission foresees a limited need for temporary guideline promulgation authority in order to be responsive to congressional enactments of new criminal statutes or amendments of existing statutes. Again, the time lag between such congressional action and the present statutory ability of the Commission to promulgate Sentencing Guidelines to implement the congressional enactment could be considerable. The temporary authority sought could shorten that time lag and more fully effectuate the legislative will.

Finally, the Commission foresees the possible need for temporary guideline promulgation authority in situations where the courts might invalidate a Sentencing Guideline or part thereof. With the authority requested the Commission could promptly act to remedy a legal deficiency found by the courts.

Answer to Question 2(b)

Under the terms of the proposed amendment granting the Commission temporary guideline promulgation authority, any guidelines, or amendments to guidelines, would remain in effect until the next regular amendments report has taken effect (or been rejected by Congress). Thus, temporary amendments promulgated in June, for example, could remain in effect until near the end of October of the following year, assuming the Commission submitted its next regular amendments report on the following May 1. The Commission's objective, however, certainly is not to avoid Congressional review of any temporary amendments promulgated under the requested authority. To the contrary, it would be our intention to promptly inform Congress of any such amendments issued by the Commission. It also follows that, should Congress disapprove of any temporary amendment, it could enact legislation to modify or nullify it.

Question 3

The proposed amendment provides that the Commission could put such temporary guidelines into effect for any "urgent or compelling reason . . . relating to the application of a previously established guideline."

a. Other than the invalidation of an existing guideline, what are the "urgent or compelling" circumstances under which the Commission would promulgate temporary guidelines?

Response to Question 3

As indicated in our answer to question 2(a), some problems in application of existing guidelines have already been brought to the Commission's attention, and it stands to reason that others will be discovered with the advent of guidelines sentencing.

Where these problems are of a serious and widespread nature, the Commission believes remedial action may be "urgent and compelling." The need for this limited authority is greatest in the early stages of guideline application in order to make the guideline system operate more smoothly and consistently, minimize errors, and reduce the need for corrective action on appeal. Thus, the Commission anticipates that this authority will have important system benefits, particularly in the first year or so of guideline sentencing.

Question 4

Some people have criticized the Guidelines for limiting the availability of probationary sentences in instances where the

Guidelines call for a sentence or more than six months. They believe that probation should always be an option, notwithstanding the sentencing range specified by the Guidelines.

a. Why did the Commission decide not to permit probation as a sentencing option in instances where the Guidelines call for a sentence of more than six months?

b. Isn't probation always available in extraordinary cases when departure from the Guidelines is warranted?

Answer to Question 4(a)

The Guidelines do not authorize a sentence of "straight" probation (without any interim confinement conditions) in any case in which the "offense level" exceeds 6. Under the statute, 28 U.S.C. § 994(b), a guideline range of imprisonment may not exceed the greater of 6 months or 25 percent, unless the minimum of the range is at least 30 years, in which case the maximum may be life. As Judge Breyer explained in his written statement, given this statutory mandate, the Commission believed it would be inconsistent and that it would create an obvious discontinuity to both authorize probation--in effect zero imprisonment--while also restricting the range of imprisonment to 6 months or 25 percent. Furthermore, the use of such a separate, "in-out" probation guideline has other strong policy disadvantages. It runs counter to central purposes of the Act--those of achieving greater uniformity and certainty of punishment for similar crimes and similar offenders. It also sends an undesirable signal to the public that certain offenses carry a minimum risk of imprisonment, thereby undercutting deterrence. Moreover, the statute and the Guidelines clearly authorize departures in atypical cases where an incarcerative sentence is not appropriate, thereby addressing what is often cited as the principal need for such a separate probation guideline. Finally, the system of guidelines and sentencing table adopted by the Commission is based upon relative crime seriousness. Therefore, it structurally addresses the vast majority of situations where probation is or is not an appropriate sentence, in the view of the Commission.

Response to Question 4(b)

Yes.

Question 5

The Commission rejected several innovative approaches to sentencing in favor of an "empirical approach" whereby an attempt was made to select sentencing ranges that approximate existing practice. The limitation on probation appears to be an exception to this.

a. Why did the Commission decide to divert from the empirical approach in the case of white collar crime?

b. Do you have any estimate of the number of white collar criminals who will go to jail under the Guidelines who would not have been incarcerated under existing practice?

c. What changes in prison capacity, or type of prison facilities, will be needed to accommodate this increase?

Response to Question 5

The Sentencing Reform Act of 1984 expressly required that the United States Sentencing Commission consider--though not necessarily be bound by--past sentencing practices. The Commission found that review of past practice was a useful tool both for discovering unwarranted disparity and for identifying a societal consensus on what constitutes "just" sentencing for particular crimes. Thus, in many areas, but not all, past practice provided a more useful guide, at least as a starting point, than more theoretical approaches. Answers to your specific questions follow below.

(a) In the area of white collar crime--where the Guidelines' departure from past practice may be the most dramatic--the Commission found that the degree of reliance placed upon the use of probation in the past was unwarranted. As this Committee stated in its report on the Comprehensive Crime Control Act, "in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted . . . without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance." S. Rep. 98-225, pp. 98-99 (Sept. 14, 1983). The Commission fully concurs in the Committee's assessment and believes that the Guidelines, by ensuring that many more white collar offenders will serve at least short terms of imprisonment, will provide greater general deterrence and an increased perception of just punishment under law. Moreover, the Commission found that in the past sentences for white collar crimes were considerably lower than those for substantially equivalent non-violent crimes against property. Accordingly, the Commission believes that requiring white collar criminals to serve at least some time in prison will provide increased equity and rationality in Federal sentencing.

(b) The Commission estimates that in most instances white collar offenders will be sentenced to more time in prison under the Guidelines than would have occurred in the absence of the Guidelines although the average time served will continue to be relatively short. The following table describes the increases in the average time served (in months) which the Commission has projected for certain categories of white collar offenses.

OFFENSE	AVERAGE TIME SERVED CURRENTLY	AVERAGE TIME SERVED UNDER GUIDELINES
Fraud	7.0	8.1
Embezzlement	3.2	4.3
Forgery	6.3	6.7
Tax	5.5	11.9

Similarly, the Commission estimates that fewer white collar offenders will be sentenced to probation and that more will be sentenced to split terms (i.e., relatively brief terms of imprisonment followed by terms of supervised release, with or without a confinement condition) under the Guidelines. The following tables contrast the percentage of offenders currently sentenced to probation and split terms with the Commission's projections of future sentencing practices under the Guidelines for specific categories of white collar offenses.

PERCENT OF OFFENDERS RECEIVING PROBATION

OFFENSE	CURRENT PRACTICE	UNDER THE GUIDELINES
Fraud	59%	24%
Embezzlement	70%	37%
Forgery	64%	34%
Tax	57%	3%

PERCENT OF OFFENDERS RECEIVING SPLIT TERMS

OFFENSE	CURRENT PRACTICE	UNDER THE GUIDELINES
Fraud	18%	21%
Embezzlement	18%	20%
Forgery	10%	13%
Tax	25%	36%

(c) The Commission does not foresee a substantial effect upon prison capacity resulting from the Guidelines' treatment of white collar offenders. As mentioned above, in drafting those Guidelines, the Commission determined that short prison terms for white collar offenders would increase both the fairness and the deterrent effect of the criminal justice system. The fact that many more white collar offenders will be sentenced to short prison terms is significant in mitigating any adverse effect on prison capacity. Even though more white collar offenders will be going to prison, the relatively brief duration of the term means that more prisoners can occupy the same space over time. As a result, a substantial increase in white collar prisoners should not produce a need for substantially more prison capacity.

More specifically, once the Guidelines are fully implemented (and that will not occur for some time yet because of their applicability only to offenses committed on or after November 1, 1987), we project that somewhere between an additional 8800 and 10,000 persons per year will be required to serve some time in prison. Many, if not most, of these additional persons sentenced to some period of confinement will be "white collar" offenders. At the same time, because the average incarceration term of these additional offenders is relatively short--considerably less than a year--the net increase in demand for corrections space as a result of this policy change is not that substantial. Moreover, it is not nearly as expensive to provide because it will largely involve the use of additional private sector, contract facilities in the community rather than conventional prisons owned and operated by the Bureau of Prisons. There will, however, be a substantial demand for more space in the latter kind of facilities as a result of the longer terms of imprisonment required by the 1986 Anti-Drug Abuse Act, the career offender provision of the Sentencing Reform Act, and other factors outside of the Sentencing Guidelines themselves.

RESPONSES TO QUESTIONS OF SENATOR GRASSLEY

Question 1

Out of all the proposed amendments to the Sentencing Reform Act, which are your absolute top priorities and why?

Could these amendments wait until after the Guidelines are up and operating and there is an opportunity to review their operation in the federal courts? Why or why not?

Response to Question 1

As Chairman Wilkins and Commissioner Nagel mentioned, the provision making the Guidelines applicable only to offenses occurring on or after November 1, 1987, and the clarification of the departure standard are among the top priorities for prompt legislative action. These changes in the Act are needed as soon as possible in order to ensure the Guidelines operate as Congress intended. Delay in their enactment will only lead to uncertainty, needless litigation, and unnecessary burdens on the court system and the Commission.

Question 2

(a) Do you foresee a constitutional challenge to the general Guidelines themselves and their application? Follow-up: How successful would you imagine such an appeal might be?

(b) Besides the apparent ex post facto problem that is addressed by proposed amendments to the Sentencing Guidelines, are there any other potential problems you may see regarding the application of the Guidelines by the federal courts? By this I mean, have you been able to assess whether an appeal would be successful, based on the application of the Guidelines themselves, using whatever constitutional argument a defendant's attorney could come up with?

Response to Question 2

We expect that there will be constitutional challenges to the Sentencing Guidelines, but are reasonably confident that the Guidelines will be upheld. Of course, there may also be challenges to individual Guidelines of both a constitutional and statutory nature. It is impossible to foresee exactly how and where such challenges might be brought. The temporary guideline promulgation authority requested by the Commission would enable us to sooner respond to any court invalidation of individual Guidelines.

Question 3

Is there an estimate of how many potential ex post facto challenges against the new Guidelines might be made by those prisoners remaining within the control of the Parole Commission--before it goes out of existence? Is there any best estimate of the successful rate of such suits?

Response to Question 3

We do not believe there would be any basis for an ex post facto challenge to the Sentencing Guidelines by an offender within the jurisdiction of the Parole Commission who, by definition, would not have been sentenced under the Guidelines.

Question 4

Knowing that the use of parole has been modified by the Commission's Sentencing Guidelines, do you envision the federal criminal justice system ever using parole in conjunction with the sentences of convicted criminals to the same extent it was used before implementation of the Guidelines? Why or why not?

Response to Question 4

Parole was abolished by the Sentencing Reform Act itself, not by the Commission. Any decision to reinstate the concept of parole would be up to Congress. Under the Sentencing Reform Act, the court may impose a term of supervised release following a period of imprisonment (which the Guidelines require following any term of imprisonment exceeding one year). Functionally, supervised release is similar to parole, except that it is under the jurisdiction of the courts rather than a parole commission.

Question 5

Do you believe that the proposed amendment to eliminate the requirement that the Commission respond to every petition from a prisoner seeking to alter the Guidelines should at least require the Commission to keep statistics on the petitions they do receive? Follow-up: Wouldn't these figures be useful in administering the federal criminal justice system? (See Sec. 121 of the Criminal Fines and Sentencing Amendments.)

Response to Question 5

We see no compelling need for granting defendants a special statutory right to petition the Commission for amendments to the Sentencing Guidelines since the Commission has no authority to modify any individual sentence. At the same time, we expect to consider all requests for changes in the Guidelines, regardless of the source. Separately accounting for prisoner petitions serves no useful purpose that we see and would be unduly burdensome.

Question 6

Would you please give your estimation of the effect upon the population of our federal prisons once the Guidelines are applied on a routine basis?

Response to Question 6

The Commission estimates that the Guidelines will account for only a minimal amount of the increase which has been forecasted for the prison population over the next ten years. Under "low growth" assumptions, and in the absence of the implementation of the sentencing provisions of the Anti-Drug Abuse Act, of the career offender provisions of the Comprehensive

Crime Control Act, and of the Guidelines, the Commission believes that prison population will increase by 50 percent over the next decade. Taking into consideration the new drug law and the career offender provisions, prison population will at a minimum increase from the current level of 42,000 to 89,000 in 1997. Adding the effects of the Guidelines into the analyses raises the projected prison population only slightly: to 92,000 in 1997. That is, the incremental effect of the Guidelines is relatively modest, only about 3 percent in 1997.

The Commission has also made estimates based upon "high growth" assumptions. Under those assumptions, it is estimated that the prison population will increase from the current 42,000 to 78,000 in 1997 even without a full implementation of the new drug law, the career offender provisions or the Guidelines. The new drug law under the "high growth "assumption, is projected to contribute an additional 39 percent to prison population by 1997. The additional effect attributable to the Guidelines is 4 percent in 1997. A more detailed presentation of the Commission's estimates of the prison impact of the Guidelines is presented in Block and Rhodes, The Impact of the Federal Sentencing Guidelines, NIJ Reports, No. 205 (Sept./Oct. 1987) and in U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987) 62-75, copies of which are attached as Exhibits.

Research in action

The impact of the Federal sentencing guidelines

by Michael K. Block and
William M. Rhodes

As part of the Crime Control Act of 1984, Congress created the U.S. Sentencing Commission as an independent body in the judicial branch of government. The seven voting and two nonvoting members were appointed by the President and confirmed by the Senate.

The Commission was charged with establishing sentencing policies and practices for the Federal criminal justice system that fulfill the purposes of sentencing—punishment, deterrence, incapacitation, and rehabilitation. Specifically, the Commission was directed to produce guidelines that would avoid unwarranted sentencing disparities while retaining enough flexibility to permit individualized sentencing when called for by mitigating or aggravating factors.

The Commission began its work in 1985 and submitted guidelines to Congress April 13 of this year. The guidelines will automatically take effect November 1 unless Congress rejects them.

Part of Congress' charge to the Commission was to project the impact of the guidelines on the prison population. This is a new and possibly unique step in legislation of this kind. It represents an attempt to forecast policy implications—how changing sentencing practices will affect other parts of the system. This article summarizes the Commission's effort.

The guidelines will dramatically alter sentencing practices in the Federal criminal justice system. To determine the effect on actual sentences and prison population, we developed a sophisticated prison impact model. Sentencing information was collected on more than 10,000 recent cases so that the impact of the guidelines could be more accurately forecast.

Straight probation sentences will decrease

One of the effects of the guidelines will be to reduce straight probation—probation without any conditions of confinement. Under current practice, probation terms that require some confinement include probation with jail as a condition of probation, split sentences, and mixed sentences.

The guidelines create two new types of sentences similar in form to a split sentence. For minimum sentences of no more than 6 months, the defendant may receive a probation term that includes a period of intermittent or community confinement. For minimum sentences of no more than 10 months, the defendant's sentence may be "split" between incarceration and community confinement.

As Figure 1 indicates, 41.4 percent of all convicted defendants currently receive straight probation. After the guidelines are implemented, only 18.5 percent are projected to receive this sentence. Drug law violators offer a dramatic example. Straight probation sentences for convicted drug offenders are projected to fall to 5.1 percent.

For some especially serious crimes, probationary sentences in any form will decline greatly. Currently 41.4 percent of those convicted of crimes against persons receive some form of probation. This proportion is projected to decline to 25.4 percent after the guidelines are implemented. Probation and split sentences for robbery will decline from 26 percent to 5 percent (not specifically shown in Figure 1) and for drug offenses from 33.8 percent to 13.3 percent.

Average time served will increase somewhat

Time served will increase on average from 15.8 months to 29.3 months under the guidelines, with most of this increase concentrated in a few crimes. For most crimes time served will remain essentially unchanged (see Figure 2).

Summary of projected impact

- "Straight" probationary sentences (i.e., sentences that require no form of confinement) will be reduced significantly.
- For especially serious crimes, such as drug offenses and crimes against persons, probationary sentences will decline dramatically.
- For other crimes, like property offenses, the proportion of sentences involving some form of probation will not change appreciably, although probation with a condition of confinement may be substituted for straight probation.
- Average time served for violent offenses will increase substantially. For most property crimes, average time served will remain largely unchanged. Exceptions: burglary and income tax fraud, where average time served will go up.
- Federal prison populations will grow markedly by the end of this century, more as a result of the Anti-Drug Abuse Act of 1986 and the career offender provision of the Comprehensive Crime Control Act of 1984 than as a result of the guidelines.

Michael Block, Professor of Law and of Economics and Policy at the University of Arizona, is a member of the U.S. Sentencing Commission. William Rhodes is Research Director of the Commission.

In estimating the impact of the guidelines on the average length of sentences, we attempted to isolate the effects of the Anti-Drug Abuse Act of 1986 and the career offender provision of the Comprehensive Crime Control Act of 1984. The 1986 drug law significantly increases the minimum and maximum prison terms for most drug offenses. Additionally, the 1984 Act required the Commission to adopt guidelines that would assure that certain repeat offenders—those 18 or older who are convicted of a violent crime or drug offense and who had been convicted of two or more such crimes previously—receive sentences at or near the maximum term authorized. In accordance with this provision, the Commission established for these offenders guideline sentences close to the statutory maximums.

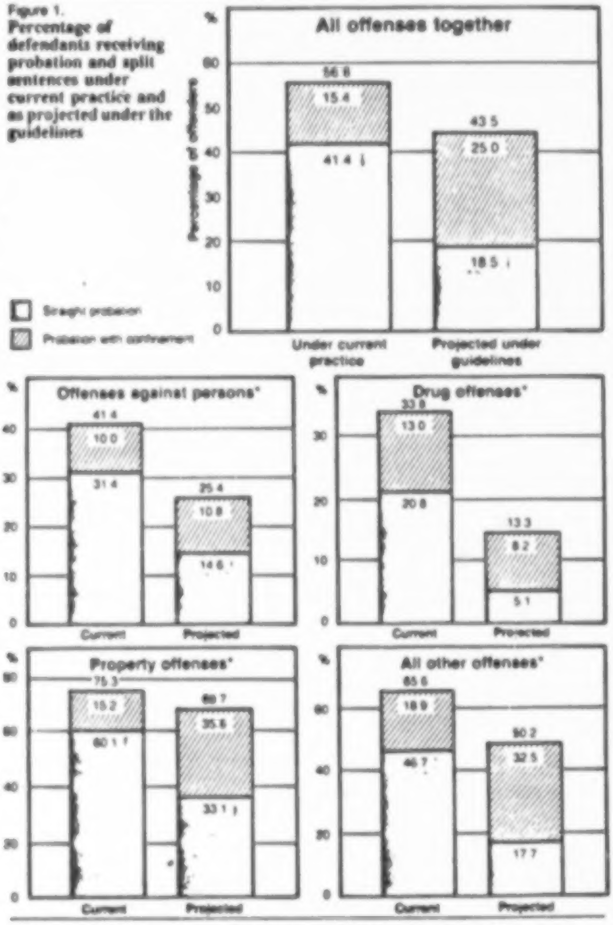
In most cases where neither the drug law nor the career offender provision are applicable, average sentence lengths are not altered radically. For these crimes (firearms, fraud, property, and immigration), the projected reduction in straight probation will be the major impact of the guidelines. More defendants will be confined, but for shorter terms than at present. Their confinement will frequently be in community-based or other minimum-security facilities.

Income tax evasion is the one crime not subject to either the drug law or the career offender provision where the guidelines themselves are projected to have a major impact on average sentence length. The average sentence is projected to more than double from a current level of less than 6 months to approximately 1 year. Not only will probation be reduced and hence the probability of confinement be increased, but the overall amount of confinement will also be increased. This increase in sentencing severity follows from treating income tax evasion like other frauds resulting in comparable dollar losses.

The guidelines alone will not have a major impact on prison population

The precise effect of these changes on overall prison demand is not obvious. For example, a significant increase in the sentence for a crime rarely prosecuted will have little effect on prison

Figure 1.
Percentage of defendants receiving probation and split sentences under current practice and as projected under the guidelines



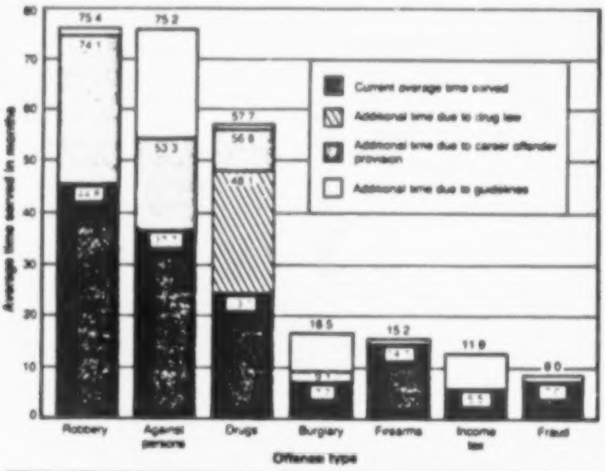
Note: In these charts, straight probation refers to probation without any period of confinement. Probation with confinement refers under current practice to probation with any form of incarceration (with jail as a condition, split sentences, and mixed sentences). Under the guidelines, probation with confinement also includes intermittent confinement or residence in a community treatment center.

"Offenses against persons" includes homicide, assault, rape, and kidnapping. "Property offenses" includes embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft. "All other offenses" includes robbery, burglary/trespass, fraud, and income tax, firearms, and immigration offenses.

The impact of the Federal sentencing guidelines

Figure 2

Time served under current practice and projected impact of recent drug law, career offender provision, and guidelines



The average time served is reported for *all* offenders, including those not sentenced to prison, who are counted as having 0 months of imprisonment. Imprisonment includes prison, jail, and community corrections confinement.

Note: The impact of the guidelines on two other offenses is expected to be negative. The average time served for property offenses is expected to go down to 6.5 months from the existing 6.8 months. For immigration offenses, the time served is likely to go down to 5.2 months from the current 5.7.

demand. By contrast, a small increase or decrease in the average sentence for a frequently prosecuted crime may have a substantial impact.

The Commission has projected prison demand for the years 1992, 1997, and 2002. The projections for 1992 are believed to be the most accurate because prosecution policies are unlikely to change significantly over this time period. This is especially true over the next 3 years, during which the present administration will continue to influence prosecution policies.

The 10-year projections merit somewhat less confidence. Nevertheless, they provide a general impression about prison demand over a longer time period. The 15-year projections are necessarily very speculative and are presented only so the long-term relative effects of the Anti-Drug Abuse Act, career offender provision of the Comprehensive Crime Control Act of 1984, and guidelines can be considered.

To estimate the impact on the Federal prison system of the guidelines, the Anti-Drug Abuse Act, and the career offender provision, we first had to establish as a "baseline" a projection of future prison demand in the absence of any change in current sentencing practices. Some assumptions necessarily had to be made about the future growth or decline in criminal prosecutions. This is difficult because criminal caseloads are determined by the crime rate, by expenditures on investigative and prosecutorial resources, and by administration policy as carried out by U.S. attorneys. To deal with these unknowns, two different scenarios were considered; one presumed "low growth" in the prosecution rate and the other presumed "high growth."

Figure 3 depicts 15-year prison population projections under low-growth and high-growth assumptions. Projections are given for both existing and future sentencing practices.

Even before considering the effect of these new statutes, prison population under the low-growth scenario is projected to increase 50 percent in the absence of any new statutes or change in sentencing practices.

The new drug law will cause a substantial increase in future prison populations—from 42,000 in 1987 to 85,000 in 1997. The number of inmates will double over the next decade *even under a low-growth assumption and even if the Commission did not exist.*

If we also take into account the career offender provision, *the incremental effect of the guidelines is relatively modest, only about 6 percent in 1992, 3 percent in 1997, and 2 percent in 2002.*

Under the high-growth projections, if prosecutions actually grow at this high rate over the 15-year period, we could expect more than a doubling of the present prison population without any change in sentencing practices.

High-growth projections suggest that, given current trends in prosecutions, future demands on the Federal prisons will exceed present prison capacity by significant proportions. While we treat these projections as the upper limit of future prison demand, they are not beyond the range of experience. Over the last 15 years, the Federal prison population has more than doubled, from more than 20,000 to more than 40,000.

Under this high-growth scenario, the drug law is projected to have a substantial effect on future prison population. Because of the drug law, the prison population is projected to increase by over 17 percent in 1992, 39 percent in 1997, and 46 percent in 2002.

History of sentencing guidelines

The idea of sentencing guidelines is relatively new—dating back a mere 15 years or so in the United States. But the problems guidelines seek to address are not. They result from sentencing practices that have evolved over many decades.

During most of this century, sentencing decisions were based on the idea that each case is unique and requires an individualized sentence, determined primarily by offenders' rehabilitative needs but influenced also by the traditional goals of deterrence, punishment, and incapacitation. Indeterminate sentencing laws were enacted that gave judges the authority to choose from a wide range of sentencing alternatives.

As judges exercised their discretion, very different sentences often were imposed for the same offense or for the same or similar kind of offender. Some disparity seemed to result from race, sex, or economic discrimination. Some plea bargaining decisions and the possibility of early parole also contributed to public perception that sentences were neither predictable nor fair.

Sentencing guidelines emerged as one of a number of solutions proposed by critics of indeterminate sentencing, offering guidance to judges without constraining them with absolute rules.

Guidelines were pioneered in the area of parole, through a 1972 pilot project for the U.S. Parole Commission, sponsored in part by a grant from the National Institute of Justice. To achieve the project's goal—more predictability in Federal parole decisions—researchers drew up "empirical" guidelines based on an analysis of the concerns underlying past parole decisions.

They developed a matrix that contained scales of offense severity and "parole prognosis" (probability of recidivism) on one axis and on the other a range of prison terms from which the prisoner's release date could be chosen. The project was so successful that guidelines were suggested for criminal sentencing decisions as well.

Voluntary guidelines

In 1974, the National Institute of Justice initiated a series of feasibility studies of voluntary sentencing guidelines. These took place first in the Vermont District Courts and in the District Court in Denver, Colorado. Vermont dropped out, but Chicago, Phoenix, and Newark joined in. Results of the studies were encouraging, and in November 1976 Denver judges adopted voluntary sentencing guidelines—the first local jurisdiction to do so.

In 1979, the National Institute of Justice decided to test the feasibility of voluntary guidelines on a statewide basis in Maryland and Florida. If the same guidelines could be adopted by demographically and culturally diverse counties in these two States, then statewide guidelines were viable, it was reasoned.

Since the statewide guidelines had been devised by judges and were based on judges' previous decisions, it was assumed they would be easily accepted and widely used. Followup evaluations funded by the National Institute of Justice indicated, however, that voluntary guidelines did not have much impact on sentencing outcomes. Pockets of resistance were observed in both States.

Evaluators faulted the voluntary nature of the guidelines and the failure to enlist participation of defense and prosecution in guidelines development. Nonetheless, the voluntary guidelines were an important stage in the development of another model, the "sentencing commission" model, first tried by Minnesota.

The Minnesota experience

Minnesota tackled the disparity issue head on by adopting a system that departed from exclusive reliance on previous sentencing practices, reflected a broad consensus, and encouraged compliance. The State adopted a model which has as its essential features a sentencing commission, presumptive sentencing guidelines, and appellate sentence review.

The sentencing commission is made up of judges, prosecutors, defenders, law enforcement officers, probation/parole agents, and citizens. Both prosecution and defense have a right to appeal a sentence they consider inappropriate. To further maintain consistency and judicial control over sentence implementation, Minnesota abolished parole.

The guidelines the commission submitted to the State Legislature in 1980 were not empirical but reflected instead the commission's own sentencing priorities. It adopted retribution as the dominant sentencing goal, and established very narrow felony sentencing ranges based on the seriousness of the offense and the offender's prior criminal history. The commission further adopted an explicit policy that the guidelines would not result in an increase in prison population.

The commission sought to eliminate race, sex, and economic discrimination by eliminating from sentencing decisions consideration of such personal factors as the offender's education, employment, marital status, or living arrangements.

Use of the commission model elsewhere

Other States have pursued somewhat different courses. For instance, Pennsylvania rejected its commission's narrow guidelines and instead adopted guidelines in 1982 that specify three sentencing ranges—a normal range, an aggravated range, and a mitigated range. Although compliance rates are high, the ranges are so broad that there is still room for considerable disparity. Other States—Maine, New York, and South Carolina—have explored the sentencing commission model but have not successfully implemented it. Connecticut abandoned it in favor of a statutory determinate sentencing system.

Washington State passed guidelines in 1984 that resemble Minnesota's but are slightly broader. The Washington guidelines apply to both felonies and misdemeanors and include statewide prosecutorial charging and bargaining guidelines as well. Compliance with the guidelines has been high in Washington.

The middle ground

In many jurisdictions, the development of sentencing guidelines is taking place amid a debate regarding the adoption of more drastic, legislatively mandated determinate sentencing on the one hand, and continuance of indeterminate sentencing on the other. Sentencing guidelines are viewed by many as offering a constructive "middle ground" between these two extremes. The current debate is largely over their substance and their implementation.

The impact of the Federal sentencing guidelines

The effects of the guidelines are modest in comparison. Specifically, the additional effect attributable to the guidelines is 7 percent in 1992, 4 percent in 1997, and 4 percent in 2002. Although the impact of the guidelines is somewhat larger under this scenario than under the low-growth scenario, it is still modest. Even the upper bound of the impact of the guidelines on prison population is not likely to be significant. The same cannot be said for the impact of the new drug law, or for that matter, the career offender provision of the Comprehensive Crime Control Act of 1984.

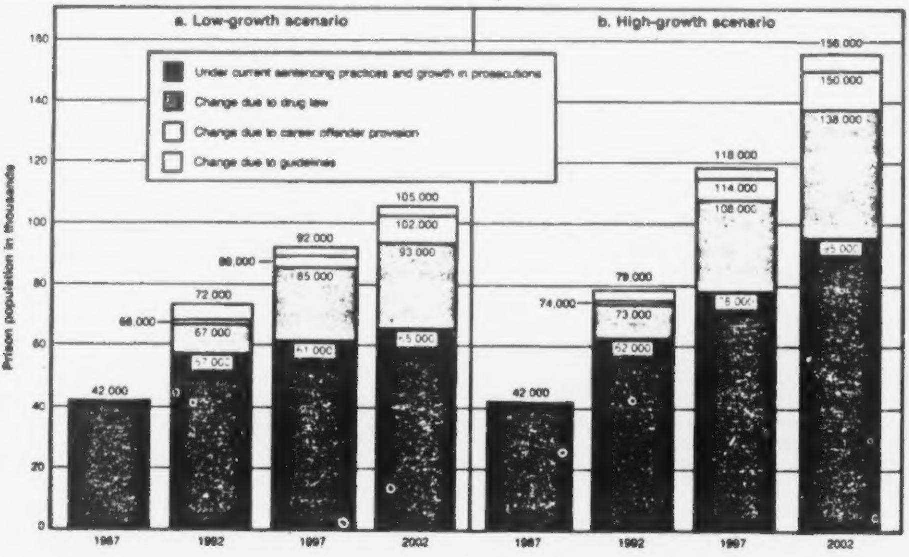
Problems in projecting the guidelines' impact

One obvious factor that substantially influences any prison population forecast is the future level of crime. Except for short-term projections, however, no reliable method exists for predicting future crime rates. Moreover, changes in the sentencing structure can be expected to affect crime through deterrence and incapacitation.

Even if future crime rates could be predicted with an acceptable degree of accuracy, historical data indicate a weak relationship between changes in the number of offenses of a given type and changes in the contemporaneous level of Federal prosecutions. Such discrepancies result partially from the exercise of discretion by Federal prosecutors and partially from changing enforcement priorities. To the extent that priorities are set by the administration in office, predicting future priorities involves predicting the outcome of future elections and the policies successive administrations will pursue. These highly speculative factors make the forecasting problem especially difficult.

Figure 3

Prison population projections



a. Low-growth scenario. The baseline projections for 1987–1989 are based on the average annual growth for the years 1982–1986. Thereafter, criminal cases were assumed to grow at a rate of 1 percent per year.

b. High-growth scenario. The baseline projections for 1987–1991 are based on the average annual growth for 1982–1986. Projections for 1992–2002 are based on the average annual growth that reproduces the same 15-year percentage growth for 1987–2002 that was observed for 1971–1986.

There is also the question of how closely Federal judges will follow the guidelines. Judges may depart from guideline sentences for factors not adequately considered in the guidelines, provided they explain in writing their reasons for departure. While the Commission does not expect departures from the guidelines to occur with great frequency, it is not known how often they will occur, which direction they will take, and how large they will be. Thus, the discretion to depart from the guidelines, which is integral to the legislation that established the Commission, creates uncertainty about the ultimate impact of the guidelines on actual sentences.

Future plea negotiations are another problem that clouds prison projections. Plea negotiations are an integral part of Federal criminal justice administration. Recognizing the functional role of plea bargaining, the guidelines attempt to structure the bargaining process, not eliminate its practice. The plea bargaining environment must change under the guidelines, but the nature and extent of the changes are unknowable, creating additional uncertainty for projecting future sentencing practices.

Using sensitivity analysis, we adjusted impact projections to account for the uncertainty inherent in projecting future prison demands in the face of major policy innovations. All the results reported in this article are somewhat affected by alternative assumptions adopted for the sensitivity tests, but the major conclusions are substantively unaffected.

Against the backdrop of these various problems, one might nevertheless fear that any impact projections will be far too speculative to be trusted. But decisionmakers do not have the luxury of adopting this view. Failure to project the impact of the guidelines on sentences and on prison capacity as realistically as possible could convert an imprecise decisionmaking process into a wholly arbitrary one.

Details of the model the Commission developed and of the data used for the projections may be found in the Supplementary Report on the Initial Sentencing Guidelines and Policy Statements *published by the Commission.*

Sentencing Commission Chairman Wilkins answers questions on the guidelines

Recently *NIJ Reports* asked U.S. Sentencing Commission Chairman William W. Wilkins, Jr., to answer a few questions regarding the proposed Federal sentencing guidelines and how they were developed. His answers follow.

How did public concerns and attitudes influence the guidelines? What were the most significant obstacles to development?

Public input has played a pivotal role in the formulation of the guidelines, with the Commission receiving more than 1,000 written comments, testimonies, and observations from various individuals and groups.

One of our first official actions was to form working and advisory groups to assist us in addressing the many complex issues we faced in promulgating sentencing guidelines. The groups consisted of Federal judges, prosecutors, defense attorneys, victim advocates, public interest and membership groups, and individuals with an interest in criminal justice. In addition, all Commission meetings were open for public attendance.

The Commission decided early on that responsible public policy is only as good as the quality and breadth of the public input that goes into its creation. For this reason, the Commission held six topical hearings in Washington, D.C., on various issues crucial to drafting sentencing guidelines.

After publishing a preliminary draft of guidelines in September 1986, the Commission held five regional hearings across the country to facilitate public input. A revised draft was published in January 1987, followed by 2 days of additional public hearings in Washington, D.C.

Writing sentencing guidelines for the Federal courts is a most complex task, far more difficult than I had ever anticipated when I accepted this position. Among the hurdles the Commission had to overcome was the lack of empirical data on current sentencing practices.

Another major obstacle was the complexity of the existing Federal criminal code. A third obstacle was the short timetable Congress imposed on the Commission.

Fourth, the statute authorizing the Commission addresses a number of difficult, competing policy choices but does not always clearly instruct the Commission on how to resolve the conflicts.

Additionally, a particularly difficult task confronting the Commission throughout its work has been how to best achieve a proper balance between the competing interests of simplicity and complexity in the sentencing guidelines.

Was the Commission able to assess what its decisions meant for the Federal prison system?

The Commission has recently completed a detailed prison impact study that is included in its Supplementary Report on the initial Sentencing Guidelines and Policy Statements.[1] The Commission worked closely with the Bureau of Prisons to design this prison impact model. To ensure that the guidelines were rooted in practicality, the Commission's research staff collected detailed sentencing

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[1] An article summarizing the study is on p. 2.

Sentencing Commission Chairman Wilkins answers questions on the guidelines

information on 10,500 actual, recent cases for use as a starting point in guideline development.

Using current sentencing data as a starting point also ensured that the guidelines would not raise the prison population dramatically. The Commission deviated from current practices for policy reasons—most notably in the areas of violent and economic crime—only after careful analysis and extensive public comment.

The Commission recognized from its inception that any responsible public policy must be weighed against the cost of that policy. Some observers urged the Commission to base its entire guideline system on current sentencing practices; others advocated an approach based on a singular sentencing philosophy (that would not significantly consider current practices at all); still others contended that the Commission should structure its decisions so as to cause no increase in prison population, and some even contended that the Commission should use its authority to effectuate a net decrease in the Federal prison population. The Commission adopted none of these paths in the extreme. Instead, it chose a balanced approach based extensively on current average sentencing practices, tempered by policy judgments which the Commission felt were sound.

A particularly thorny issue, as always, was the death penalty. Could you summarize the views held by the Commission while it debated that issue?

When the question was raised as to whether the U.S. Sentencing Commission had the authority to issue capital sentencing guidelines, and if so, whether it should proceed to develop such guidelines, the Commission approached this issue in the same manner it had confronted other important legal and policy issues. This approach involved the solicitation of written legal briefs and views from a wide audience and the holding of a public hearing to receive additional input.

After careful consideration of a broad range of public comments, the Commission voted against including capital sentencing guidelines in the initial guidelines submission. A majority felt that the Commission should devote all of its efforts to the further development of the sentencing guidelines on which it had already been working for a number of months, so that those guidelines could be submitted to Congress on schedule.

While I personally favor capital punishment, I voted with the Commission majority. I did not want to jeopardize the months of work that the Commission had invested in this important sentencing guidelines effort by interjecting the capital punishment issue into the initial submission of guidelines to Congress. The subject of capital punishment is so highly controversial and emotional that it could easily have overshadowed any consideration of the merits of the remainder of the sentencing guidelines and possibly led to rejection of the entire product.

Are sentences under the guidelines universally stiffer? Will plea bargaining work to undermine the Commission's intentions?

Sentences under the guidelines are not universally stiffer than current sentencing practices. Our best estimates show the average time served for violent offenses will increase substantially under the guidelines. On the other hand, average time served for most property crimes will be about the same and, in some cases, lower than current experience. In the area of "white collar" crimes, such as income tax evasion, price fixing, and insider trading, imprisonment will be required under the guidelines much more frequently than in current practice.

With respect to plea bargaining, the Commission has proceeded cautiously, and we think appropriately, in these initial guidelines. Given that over 85 percent of all Federal defendants enter guilty pleas, and that almost 80 percent of all guilty pleas involve an explicit plea agreement, the Commission did not believe it wise to stand the Federal criminal justice system on its head by making too drastic and too sudden a change in these practices.

What we did do in our initial guidelines and policy statements is quite important, however. The Commission's policy statements on plea agreements require that the entire agreement be fully disclosed on the record and that the agreement set forth the relevant facts of the actual offense conduct and defendant characteristics. If the agreement includes a recommendation that the court depart from the sentence otherwise applicable under the guidelines, the specific basis for that recommended departure must be stated, and the court then must decide whether the agreement is acceptable.

Thus, the Commission's proposals in this area encourage full disclosure in sentencing with respect to plea agreements. Testimony before the Commission established that the principal concerns with current plea practices are the secrecy of the process and the perceived manipulation or concealment of relevant evidence. The policies enunciated by the Commission are designed, as a starting point, to change this—to bring a greater openness and honesty to the plea agreement process. Based on monitoring and evaluating sentencing experience with plea agreements under the initial guidelines and policy statements, the Commission can then determine what further steps may be needed in this important area.

Now that the final guidelines have been submitted to the Congress, have you had time to reflect on the meaning of the guidelines? Do you see them structuring judicial discretion or perhaps serving as a model for State guidelines?

I believe the sentencing guidelines, together with other procedural and substantive changes brought about by the Sentencing Reform Act (such as the abolition of parole and the imposition of determinate sentences), will drastically change and improve our Federal criminal justice system. These sentencing reforms will structure judicial discretion and thereby lead to greater uniformity and fairness in sentencing of similar defendants who commit similar crimes in a similar manner.

I also believe that if this effort at the Federal level is generally found to be successful, these guidelines will foster the development of guidelines by many States that do not already have them. The extent to which these guidelines can serve as a model is limited, however, by the considerable differences between the Federal and State criminal codes.

How are Federal judges likely to react to the new system? Do you foresee a protracted phase-in or a rapid implementation?

I venture that if you took a survey of Federal judges' opinions regarding the concept of sentencing guidelines, many would voice opposition. However, I have been pleased to learn that many Federal judges have acknowledged the need for increased fairness and consistency through guideline sentencing. On the whole, when judges take the time to study the guidelines and apply actual cases using the Commission's draft worksheets, I believe the vast majority will be pleasantly surprised, and the guidelines will earn wide acceptance.

Unless amended by Congress, the implementation date for the guidelines is November 1, 1987. In its letter of transmittal to Congress, the Commission suggested Congress consider a stay of implementation for an additional reasonable period to provide time for training and education.

I advocate a stay of implementation only if carefully limited legislation can be passed by Congress to accomplish this objective without undermining the Sentencing Reform Act or the guidelines.

The very nature of the investigation, arrest, indictment, conviction, and sentencing process builds in a limited phase-in implementation period for the guidelines. The Commission has recommended that the guidelines apply only to offenses occurring after November 1, with the result that the number of cases which work their way through the system to the point of application of the sentencing guidelines will increase on a gradual, manageable basis.

In the interim, judges and other members of the court family will become familiar with the operation of the guidelines through education and training programs currently being organized by the Commission and the Federal Judicial Center.

If the Congress accepts the guidelines, the Commission will have finished an important phase of its mandate. What do you see as the new role of the Commission?

The next phase of the Commission's work is a logical outgrowth of its intense first phase—the development of the initial guidelines and policy statements. The Commission is already well into that phase, which might briefly be described as one of explaining, testing, training, monitoring, evaluating, and perfecting, not necessarily in that order. We have just finished the preparation of a Supplementary Report which further explains the guidelines and describes their projected impact, especially with regard to prison populations.

The Commission has initiated an intensive clinical testing program to assist in identifying the problems, ambiguities, and incomplete areas in the initial guidelines. This process involves testing of the guidelines using sample cases by both Commission staff and by Federal probation officers in regional working sessions around the country.

At the same time, the Commission will be working with the Federal Judicial Center and others to develop programs and materials for the training of Federal judges, probation officers, and others. Broad-based, effective training is necessary to ensure that implementation of the guidelines and a new sentencing system will be as smooth as possible.

U.S. Sentencing Commission Chairman William W. Wilkins, Jr., of Greenville, South Carolina, is United States Circuit Judge for the Fourth Circuit.

The Commission is also required by law to monitor the operation of the guidelines in practice and to collect and analyze data with respect to each sentence imposed under the guidelines. This information will then be used to determine changes needed in the guidelines to ensure that the purposes of sentencing and the goals of the Sentencing Reform Act are achieved.

The process of improving the initial guidelines will be an ongoing one. The Commission is authorized to submit to Congress amendments to the guidelines on an annual basis, an authority which the Commission intends to fully use as necessary to develop a workable, effective system of guidelines. Our continuous review and testing processes have already uncovered some areas where amendments to guidelines, policy statements, or commentary are needed, and actual experience in applying the guidelines can be expected to reveal the need for other changes.

Additionally, the Commission will be addressing, in the months ahead, a number of areas where its work is incomplete, such as organizational sanctions and the promulgation of guidelines for a number of infrequently prosecuted offenses not covered in the initial guidelines document.

Thus, with all of these tasks and others such as longer range research efforts, the Commission and its staff are going to be quite busy in the foreseeable future.

EFFECT OF SENTENCING RULES MAY BE SLOWED BY CONGRESS

With Nov. 1 scarcely more than a flip of the calendar away, momentum appears to be growing on Capitol Hill toward delaying the implementation of the proposed federal sentencing guidelines.

Samuel Buffone, who heads the ABA Criminal Justice Section's subcommittee on the guidelines, told BNA he is "increasingly confident" there will be a delay, noting that he had no such confidence several weeks ago.

Buffone's comments came after the House Judiciary Committee overwhelmingly approved a bill (HR 3307) that would postpone the effective date of the guidelines for nine months, i.e., to Aug. 1, 1988. [At press time, the bill was scheduled to come before the full Houses for a vote within a week.]

The proposed Sentencing Guidelines Stay of Implementation Act of 1987 begins with congressional findings that the guidelines as submitted to Congress are "substantially workable and ready to take effect" on Nov. 1. The findings state, however, that there is need for "a brief period of additional time for the training of court personnel and others involved in the application of the guidelines, for further testing of the guidelines, and for the Commission to have an opportunity to further refine the guidelines before they are applied to criminal cases."

Buffone, who has been actively lobbying for a delay on behalf of the ABA, designates as pivotal in the vote the "emerging Republican support" for delay and "their rejection of the Justice Department position [against delay]."

He said he anticipates that there will be Senate consideration of a delay of nine or possibly 12 months, and he is optimistic that a period of at least nine months will be approved. Both on the House and Senate sides, "the key is convincing people that delay is not the same as opposition." This is in harmony with the ABA position, which is supportive of the concept of guidelines but views a delay as necessary for several reasons:

- The guidelines in their present form were not subject to public comment and criticism, as were previous drafts. A delay would "allow constructive criticism [and] round off the rough edges," Buffone said.
- Time is needed to educate the bench and bar as to the content and workings of the guidelines.
- Procedural questions, such as those relating to the scope of the sentencing hearing, need to be addressed to avoid a "potentially chaotic implementation period" and divergent resolution of such questions. By arriving at a consensus on some of these issues, Buffone said, "there still will be litigation, but perhaps it will be more focused."

REPORTS AND PROPOSALS

JUSTICE DEPARTMENT REPORTS INCREASE IN CONVICTIONS FOR WHITE-COLLAR CRIME

Sentences in white-collar crime cases also increased in severity.

Convictions for federal white-collar crimes rose 18 percent from 1980 through 1985, according to statistics released September 27 by the U.S. Department of Justice. In all, 10,733 people were found guilty in federal court of committing white-collar crimes in 1985. DOJ said the report — which was its first such analysis of federal white-collar criminal justice activities — defined a white-collar crime as a non-violent offense committed by deception for financial gain.

About 40 percent of those convicted of white-collar crimes were sent to prison, compared to 54 percent for all other federal offenders, DOJ found. White-collar offenders also served shorter sentences — an average of 29 months, compared to 50 months for other offenders, who were more than twice as likely to receive sentences of five years or more. White-collar offenders, meanwhile, were more likely to receive fines and probation in place of a prison term.

However, the average prison term for white-collar offenders increased by 20 percent from 1980 to 1985, DOJ noted. Tax fraud offenders saw the greatest increase in sentence length — 86 percent. In 1985, moreover, there was an 85 percent conviction rate for white-collar defendants, compared to 78 percent for defendants in other types of federal criminal cases. About 55 percent of those convicted of white-collar crimes in 1985 were found guilty of fraud, 19 percent were convicted on forgery charges, 16 percent for embezzlement, 5 percent for counterfeiting, and 5 percent for white-collar regulatory offenses.

Copies of the report, "White-Collar Crimes: Federal Offenses and Offenders" (NCJ-106876) may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Md. 20850. The telephone number is (301) 251-5500; those telephoning from outside Alaska, Maryland, or the metropolitan Washington, D.C., area may call toll-free, (800) 732-3277.

IN THE LEGISLATURES

ADMINISTRATION ANNOUNCES OPPOSITION TO BILL TO DELAY SENTENCING GUIDELINES

House action scheduled October 6.

A bill to delay the effective date of the U.S. Sentencing Commission's proposed new criminal sentencing guidelines has hit a couple of snags. The bill, HR 3307, was approved by the House Criminal Justice Subcommittee on September 23, see 41 CrL 2492, and by the House Judiciary Committee on September 29. But an effort to get it through the house without a recorded vote failed on October 5; on the same day, moreover, the Reagan Administration officially announced its opposition to the bill.

HR 3307 would delay the effective date of the guidelines for nine months. Rep. Dan Lungren (R-Calif), who failed in committee to cut the delay to three months, successfully objected to approving the bill on the suspension consent calendar without a recorded vote. The vote thus required is scheduled for October 6.

Meanwhile, the administration has made clear its view that the guidelines should not be delayed at all. In announcing its opposition, the administration said that "sentencing guidelines were a key and essential part of of the important sentencing reforms enacted as part of the Sentencing Reform Act of 1984." If no delay is enacted, the sentencing guidelines will begin being implemented November 1.

The nine-month delay approved by the committee was a compromise, according to committee sources, who think that the Senate, which has yet to act, may be less inclined to delay the guidelines.

Those supporting a delay include the American Bar Association, which recommended delaying implementation for two years in order to train court personnel. The U.S. Judicial Conference wanted a one-year delay, and the sentencing commission itself supported a nine-month delay in implementation of the guidelines. Judiciary Committee Chairman Peter Rodino (D-NJ) supported a middle ground delay of 12 to 18 months, according to an aide.

LEGISLATIVE CALENDAR

The following is a digest of selected actions taken by the U.S. Congress recently. The digest includes both chamber actions and committee developments in criminal justice and related areas.

SENATE

DRUGS: *9/30/87* Passed, 79-19, HR 2714, making FY 1988 appropriations for the legislative branch, after adopting a Bumpers amendment to provide for the availability of funds to the Senate International Narcotics Control Caucus during FY 1988.

NOMINATIONS: *9/28-10/2/87* Judiciary Committee continued hearings on the nomination of Robert Bork to be a Supreme Court associate justice; *9/30/87* Received the nomination of Robert Gawthrop to be a U.S. district judge for the Eastern District of Pennsylvania.

ORGANIZED CRIME: *9/29/87* Agreed to SRes 282, to authorize the production of records by the Senate Permanent Investigations Subcommittee to the Justice Department relating to its investigation of the influence of organized crime on the International Longshoremen's Association.

HOUSE

IMPEACHMENT: *9/29/87* Judiciary Committee ordered reported favorably: HRes 274, providing for the release of certain materials relating to the inquiry into the conduct of Judge Alcee Hastings, and other Hastings impeachment inquiry matters.

JUSTICE PROGRAMS: 9/30/87 Judiciary Crime Subcommittee continued oversight hearings on the the reauthorization of the Office of Justice Programs, the Bureau of Justice Assistance, the Bureau of Justice Statistics and the National Institute of Justice; Criminal Justice Subcommittee held a hearing on the reauthorization of the Victims of Crime Act of 1984.

RELIGION: *9/29/87* Judiciary Committee ordered reported favorably: HR 3258, to amend chapter 13 of title 18, U.S. Code, to impose criminal penalties for damage to religious property and for obstruction of persons in the free exercise of religious beliefs.

PRESIDENT

CHILD ABUSE: *9/28/87* Signed S 1596, to authorize the secretary of Health and Human Services to grant states an additional waiver of certain requirements for receiving assistance under the Child Abuse Prevention and Treatment Act.

NEWS BRIEFS

MONEY LAUNDERING — The Treasury Department has proposed a regulatory change to hinder the use of postal money orders for money laundering. The proposed regulation would include the U.S. Postal Service within the definition of "financial institution" contained in 31 USC 5312, which is part of the regulatory framework for implementation of the Bank Secrecy Act. As a result of the regulation, the purchase of postal money orders in an amount over $10,000, whether in a single transaction or smaller "structured" transactions, would trigger a requirement on the part of the Postal Service to make a report to the Treasury Department. The proposed regulation is published and discussed in the Federal Register for September 22, 1987, 52 Fed.Reg. 35562.

CIVIL RIGHTS ACTIONS — The Practising Law Institute has scheduled a seminar on "Section 1983 Civil Rights Litigation and Attorneys' Fees." The seminar will be held October 19-20, at the Roosevelt Hotel, in New York City, and again on November 16-17, at the Biltmore Hotel, in Los Angeles, California. The program is designed to emphasize the latest developments in §1983. It will also explore litigation of police brutality cases, the constitutional rights of public employees, municipal liability, state action, procedural issues, §1983 litigation in state courts, and sanctions in civil rights cases. The cost is $250, which includes course handbook. Individual copies of the course handbook may be purchased separately for $45. For further information, contact the Practising Law Institute, Dept. 8A-105, 810 Seventh Ave., New York, N.Y. 10019; (212) 765-5700, Ext. 271.

TAX PROSECUTIONS — The American Bar Association's Division for Professional Education will hold its fourth national institute on "Criminal Tax Fraud: A Workshop for Attorneys and Accountants," October 19-20 at the Parker Meridien Hotel in New York, and November 12-13, at the Meridien Hotel in San Francisco, California. Emphasis will be placed on how lawyers and accountants can work in unison to best represent taxpayers under criminal investigation. The cost is $475 for non-members, $450 for ABA members, $425 for Tax Section members, and $225 for government employees. All registrations must be received in the ABA offices by October 12, 1987 for the New York presentation and November 5, 1987 for the San Francisco presentation.

A20 SATURDAY, OCTOBER 10, 1987 . . . THE WASHINGTON POST

Pennsylvania Sentences Uncertain

▪ PHILADELPHIA—The Pennsylvania Supreme Court has thrown out sentencing guidelines used for most crimes, leaving uncertain the fates of hundreds of prisoners.

The court, in a 5-to-2 decision released Thursday, ruled that the state Legislature acted unconstitutionally during the process of enacting the guidelines. Sentences of inmates challenging the guidelines were left uncertain.

IN THE LEGISLATURES

HOUSE REJECTS BILL TO DELAY SENTENCING GUIDELINES

Bill would have been vetoed anyway, according to Reagan Administration.

A bill to delay for nine months the effective date of the U.S. Sentencing Commission's proposed new criminal sentencing guidelines, HR 3307, was rejected by the House of Representatives October 6. Needing a two-thirds vote for approval under suspension of the rules, the bill failed even to get a majority. The vote was 183-231.

If, as now seems likely, no delay is enacted, the sentencing guidelines will begin being implemented November 1.

The vote was a major setback for a bill that was approved easily by the House Judiciary Committee and was brought to the floor under suspension calendar procedures usually reserved for non-controversial bills almost certain to pass. The bill could still be brought up under regular procedures that entail a majority vote. But the October 6 vote would indicate majority opposition to the bill, and House staff members dismissed the idea of another vote. The staffers also said an effort to develop a package of changes in the guidelines also is now doubtful. The only additional action likely on the guidelines, the staff members said, is passage of a largely technical bill, not yet introduced, dealing with the collection of fines.

The vote by which the House defeated the legislation was attributed to bill opponents' portrayal of a vote for delay as a "soft-on-crime" vote, Judiciary Committee staff members said. Rep. Dan Lungren (R-Calif), who successfully pressed for a recorded vote on the bill, argued on the floor that the nine-month delay was "a window of opportunity for those who are convicted criminals."

About one-third of the votes against the bill came from Democrats. Almost all Republicans opposed delay.

At the same time that the bill was going down to defeat in the House, the Reagan Administration strengthened its opposition to the measure. A statement issued October 6 indicated that "the President's senior advisers will recommend that he veto the bill."

Opposition to delaying the guidelines could emerge in the Senate, too, congressional sources said. An aide to Sen. Edward Kennedy (D-Mass), who has supported the guidelines, said the senator believes many of the arguments for delay are not well-founded. The Senate Judiciary Committee is scheduled to hold a hearing on the guidelines and the delay issue on October 15.

LEGISLATIVE CALENDAR

The following is a digest of selected actions taken by the U.S. Congress recently. The digest includes both chamber actions and committee developments in criminal justice and related areas.

SENATE

ARMS TRAFFICKING: *10/7/87* While in consideration of S 1394, the State Department authorization, adopted a Pryor amendment to enhance cooperation between U.S. government agencies in the control of illegal international arms transfers, to aid in the identification and apprehension of illegal arms traffickers, and to expedite procedures for reviewing and issuing arms export licenses.

CHILD ABDUCTION: *10/6/87* While in consideration of S 1394, the State Department authorization, adopted Dixon amendments to amend title 18, USC, to punish as a federal criminal offense the crime of international parental abduction and to allocate funds for support and review of international parental child abduction cases.

NOMINATION: *10/6/87* Judiciary Committee voted 9–4 to report with a negative recommendation the nomination of Robert Bork to be an associate justice of the U.S. Supreme Court.

HOUSE

DRUGS: *10/7/87* Foreign Affairs International Narcotics Control Task Force held a hearing to review the mid-year update on the international narcotics control strategy report.

IMPEACHMENT: *10/5/87* Suspended the rules and passed, by voice vote, HRes 274, to provide for the release of certain materials relating to the inquiry into the conduct of U.S. district judge Alcee Hastings.

RELIGIOUS PROPERTY: *10/5/87* Suspended the rules and passed, by voice vote, HR 3258, to impose criminal penalties for damage to religious property.

VICTIMS: *10/6/87* Judiciary Criminal Justice Subcommittee continued hearings on HR 3352, Crime Victims Act of 1987.

Criminal Justice Calendar of Events

a program of the National Institute of Justice/NCJRS

Meetings and conferences

November

Nov. 1–4 Boston, MA

National Community Service Sentencing Association 1987 National Symposium.
Fee $100. Contact: The Community Service Center, Suite 108, 1368 Lincoln Ave., San Rafael, CA 94901 (415–459–2234)

Nov. 5–7 Chicago, IL

11th National Conference on Correctional Health Care.
Contact: Jodie Menes, National Commission on Correctional Health Care, Suite 3500, 2000 N. Racine, Chicago, IL 60614 (312–528–0818)

Nov. 5–9 Rochester, NY

Commission on Accreditation for Law Enforcement Agencies (CALEA): Quarterly Meeting for Management-Level Law Enforcement Executives and Academics.
Fee $35. Contact: CALEA, 4242B Chain Bridge Rd., Fairfax, VA 22030 (800–368–3757, 800–468–7784 (VA), or 703–352–4225 (local))

Nov. 9–10 Ann Arbor, MI

National Conference on Punishment for Criminal Offenses.
Contact: Dr. Christopher S. Dunn, Project Director, The Graduate College, Bowling Green State University, Bowling Green, OH 43403 (419–372–2481)

Nov. 11–13 Lexington, KY

North American Association of Wardens and Superintendents Second Annual Training Symposium.
Contact: Bruce I. Wolford, Conference Coordinator, Department of Correctional Services, Eastern Kentucky University, Richmond, KY 40475 (606–622–1497)

Nov. 11–14 Montreal, Canada

American Society of Criminology 39th Annual Meeting.
Fee $45 members, $55 nonmembers, $10 student members. Contact: Sarah Hall, ASC Executive Office, Suite 212, 1314 Kinnear Rd., Columbus, OH 43212 (614–292–9207)

Nov. 16–20 Charleston, SC

National Organization for Victim Assistance 13th Annual North American Victim Assistance Conference.
Fee $140 members, $170 nonmembers. Contact: Annual Conference Coordinator, National Organization for Victim Assistance, 717 D St. NW., Washington, DC 20004 (202–393–6682)

December

Dec. 1–4 Miami, FL

National Legal Aid and Defender Association 65th Annual Conference.
Fee $260. Contact: Martha Bredehoeft, National Legal Aid and Defender Association, Eighth Floor, 1625 K St. NW., Washington, DC 20006 (202–452–0620)

Workshops, seminars, and courses

November

Nov. 2–5 Troy, MI

New Perspectives on Field Training Officer Programs: New Data, New Techniques Geared for the 1980's and Beyond.
Contact: Paul Embert, Training Coordinator, School of Criminal Justice, 560 Baker Hall, Michigan State University, East Lansing, MI 48824–1118 (517–355–9648)

Nov. 2–13 State College, PA

Police Executive Development Institute.
Fee $895. Contact: James R. Horner, Director, Police Executive Development Institutes, Pennsylvania State University, S–159 Human Development Building, University Park, PA 16802 (814–863–0262)

Nov. 4–6 Williamsburg, VA

Design and Application of Industrial Security Systems.
Contact: Bryant Security Systems, P.O. Box 8729, Norfolk, VA 23503–0729 (804–627–3211)

Nov. 5–7 Columbus, OH

Domestic Violence in the 1980's.
Fee $125. Contact: John Morgan, Columbus Public Safety Department, P.O. Box 15673, Columbus, OH 43215 (614–222–7187)

Nov. 8–12 Winchester, VA

Providing Protective Services.
Fee $2,300. Contact: Richard W. Kobetz & Associates, Ltd., North Mountain Pines Training Center, Arcadia Manor, Route 2, Box 3645, Berryville, VA 22611 (703–955–1128)

Nov. 8–13 Reno, NV

Case Management: Reducing Court Delay.
Fee $475. Contact: The National Judicial College, University of Nevada, Reno, NV 89557 (702–784–6747)

Nov. 9–11 El Paso, TX

Combating Child Sexual Abuse: Special Issues.
Fee 3 days $150, 1 day $60. Contact: Dianne Trombley, Forensic Mental Health Associates, 865 Via Esplenade, Punta Gorda Isles, FL 33950 (813–637–1770)

Nov. 16–20 Louisville, KY

Supervision of Police Personnel.
Fee $300. Contact: Shirley Beck, Program Assistant, Southern Police Institute, University of Louisville, Louisville, KY 40292 (502–588–6561)

Nov. 17–20 San Francisco, CA

Student Conflict Managers Training Institute.
Fee $350. Contact: Gail Sadalla, Director, School Initiatives Program, Community Board Center for Policy and Training, 149 Ninth St., San Francisco, CA 94103 (415–552–1250)

Nov. 30–Dec. 4 Santa Barbara, CA

Analytical Investigation Methods.
Fee $445. Contact: Gladys Brown, Anacapa Sciences, Inc., 901 Olive St., P.O. Drawer Q, Santa Barbara, CA 93102–0519 (805–966–6157)

December

Dec. 1–2 Kansas City, MO

Use of Force: In Defense of Officers and Agencies.
Fee $250. Contact: Criminal Justice Consulting Services, 7938 Southeast Highway 40, Tecumseh, KS 66542

Dec. 1–4 Jacksonville, FL

Seminar for the Police Training Officer.
Fee $350. Contact: Director, Institute of Police Technology and Management, University of North Florida, 4567 St. Johns Bluff Rd. S., Jacksonville, FL 32216 (904–646–2722)

Dec. 2 Evanston, IL

Executive Institute for Suburban Police Chiefs.
Fee $350. Contact: Northwestern University Traffic Institute, P.O. Box 1409, Evanston, IL 60204 (800–323–4011 or 312–491–5476)

Dec. 2–4 Nashville, TN

Reid Polygraph Technique of Interviewing and Interrogation.
Fee $450. Contact: John E. Reid & Associates, 250 S. Wacker, Chicago, IL 60606 (312–876–1600)

Dec. 7–11 St. Petersburg, FL

Terrorism: Police Proactive Measures.
Contact: Florida Institute for Law Enforcement, St. Petersburg Junior College, P.O. Box 13489, St. Petersburg, FL 33733 (813–341–4601)

Dec. 8–9 Wilmington, DE

Field Drug Testing.
Contact: Jacob Haber, University of Delaware, 2800 Pennsylvania Ave., Wilmington, DE 19806 (302–573–4440)

Dec. 9–10 San Diego, CA

Investigations Workshop.
Contact: American Society for Industrial Security, Suite 1200, 1655 N. Fort Myer Dr., Arlington, VA 22209 (703–522–5800)

Dec. 9–11 Austin-San Antonio corridor, TX

Special Topics in Juvenile Justice.
Contact: Texas Juvenile Justice Center, Institute of Criminal Justice Studies, Canyon Hall, Southwest Texas State University, San Marcos, TX 78666–4610 (512–245–3030)

Dec. 10–11 Huntsville, TX

Investigation of Child Sexual Abuse and Sexual Exploitation.
Fee $125. Contact: For Kids Sake, 753 W. Lambert Rd., Brea, CA 92621 (714–529–8358)

Dec. 13–16 Nashville, TN

Child Abuse Intervention and Prevention for Probation and Parole Officers.
Contact: Norman Helber, American Probation and Parole Association, Box 638, Woodbury, NJ 08096 (609–853–3616)

The Calendar of Events is a regular feature of NIJ Reports. It announces national, international, and regional events directly related to criminal justice, with priority given to programs sponsored by Office of Justice Programs agencies. Information about coming events should be submitted on the letterhead of the sponsoring organization 6 months before the event to NIJ Reports Calendar of Events, Box 6000, Rockville, MD 20850. The Calendar is a representative, not an exhaustive listing. To learn about other conferences or training opportunities in your area contact the organizations cited on these pages.

CALENDAR

24th Annual Criminal Practice Institute. Sponsored by the Public Defender Service and the Young Lawyers Section of the Bar Association of the District of Columbia, Nov. 13-14, Quality Inn, Capitol Hill, 415 New Jersey Ave., N.W., Washington, D.C. Topics include basic and advanced trial techniques, pretrial preparation, defending drug offenses, sex offenses, and homicide, common evidentiary problems, motions practice, and sentencing. The fee, which includes the manual, is $175 ($155 for those who have the 1986 Manual). Included on the faculty are Steven Gordon, Kenneth Mundy, Charles J. Ogletree, James Doyle, Stephen Milliken, the Honorable Henry F. Greene. Contact Deborah T. Creek, Criminal Practice Institute, c/o Public Defender Service, 451 Indiana Ave., N.W., Washington, D.C. 20001, (202) 628-1200.

Criminal Law Developments 1987—Defense and Prosecution Perspectives. Sponsored by the Dickinson School of Law, Nov. 13-14, at the Advanced Legal Education Center, Carlisle, Pa. Topics include grand jury practice and physical and sexual abuse of children. Fee is $150 ($125 for two or more persons from same firm). Members of the faculty include: William C. Costopoulos, Herald Price Fahringer, Diane E. Gibbons, Donald J. Goldberg, Marion E. MacIntrye, Gregory T. Magarity, Hon. David N. Savitt, David C. Shipman, J. Clayton Undercoffler III, and Gordon A. D. Zubrod. Contact Dickinson School of Law, Advanced Legal Education Office, 150 South College St., Carlisle, Pa. 17013, (717) 243-4611, ext. 286.

National Legal Aid and Defender Association's 65th Annual Conference. Sponsored by the NLADA, Dec. 1-5, Miami Beach. Topics include a consideration of who commits violent crimes, gender bias in the Florida criminal justice system, and the role of human/social service providers as leaders and change agents. Fees are $200 for members and $250 for non-members registering before Nov. 1, and $235 for members and $285 for non-members registering after Nov. 1. Included as panelists are Charlene Carres, Mildred George, Larry Vellani, and Bill Chambreau. Contact Martha Bredehoeft, NLADA Conference Office, 1625 K St. N.W., Eighth Floor, Washington, D.C. 20006, (202) 452-0620.

SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS

UNITED STATES SENTENCING COMMISSION

JUNE 18, 1987

has issued guidelines for supervised release, a new form of supervision that is similar to parole. Because the length of the terms of supervised release are, by statute, generally shorter than current parole terms, the guidelines may change the demand for housing offenders removed for cause from post-incarceration supervision.[106] Full implementation of the guidelines and the career-offender provision could decrease post-incarceration prison demands by as much as 30 to 50 percent during the period covered by the impact study.

H. Prison Impact

Although the incidence of straight probation is reduced under the guidelines and time served on average is somewhat longer, the precise effect of these changes in sentencing practices on overall prison demand is not obvious. Average sentences for some offenses are shorter under the guidelines, while those for other offenses are longer. A significant increase in the sentence for a crime rarely prosecuted will have little effect on prison demand. By contrast, a small increase or decrease in the average sentence for a frequently-prosecuted crime may have a substantial impact on prison populations. Both prosecution rates and average sentence lengths must be considered in projecting future prison demand. Moreover, feedback effects of changes due to incapacitation and deterrence could decrease prison demand, as explained below.

In any given year, those defendants prosecuted by federal authorities include some "veterans" of previous federal detention. The number of such recidivists will vary with the sentencing policy in place. If first offenders get longer terms under the guidelines, for example, they thereby lose "street time" to commit further crimes that could lead to further imprisonment. Thus, guidelines or other changes in sentencing, such as the Anti-Drug Abuse Act, that raise the average sentence of first offenders could ultimately reduce the prison arrival rate, and this "feedback" effect could lessen the burden that such increases impose on prison capacity.

To investigate the importance of this feedback phenomenon, we determined the current number of recidivists among incoming federal prisoners, and then estimated how this number would change under the anticipated revisions in sentencing. There clearly would be some effects (especially among robbery offenders), but they would be fairly small. The overall prison population projections plausibly might be lowered a few percentage points because of feedback, but because such adjustments are small and uncertain, they are not included in the figures presented herein. We would stress, however, that because recidivism is far more common among state than federal prisoners, feedback effects could be more potent at the state level. Hence, because many federal prisoners are subsequently incarcerated by the states, longer federal prison terms might do more to lower arrival rates at state prisons than in the federal system.

It is also likely that, as confinement grows in certainty and duration, a significant number of potential crimes will be deterred. Nonetheless, we did not lower our arrival rate forecasts in response to this possibility, nor did we explore other potential implications of this feedback effect. One reason for this decision is the historically weak link between changes in specific crime rates and changes in federal prosecution policy. Because declines in specific crime rates do not necessarily bring about corresponding declines in the rate of federal prosecutions for those crimes,

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Approximately 80 percent of those removals resulted in a revocation and return to prison. Because the revocations result in an average prison term of about 27 months, offenders who do not successfully complete their parole terms account for a significant proportion of prison space.

[106] The reduction in the length of the terms of supervised release reduces the exposure of the releasees to revocation. It also provides a corresponding reduction in the maximum term of imprisonment that may be imposed upon revocation.

it did not appear appropriate to investigate deterrence feedback at this time, especially given the other uncertainties in our projections.

1. The Basic Model

In this impact study we made several projections of the effect of implementation of the sentencing guidelines on prison populations. Each projection incorporated somewhat different assumptions regarding the growth in prosecutions, plea negotiations and departures from the guidelines. In this section, we discuss the first set of projections, in which we assumed that (1) the proportional reductions in average time served that result from plea negotiations will change little from current practice (*i.e.*, we assume that there will be equi-proportional changes in the average time served resulting from both trials and pleas), and (2) there will be relatively few departures from the guidelines. This is referred to as the "basic model". Scenarios involving both "low-growth" and "high-growth" rates in the number of convictions are presented in this section. In later sections, the results of scenarios involving other assumptions regarding plea negotiations and departures are discussed.

The prison-impact model treats community corrections facilities as a form of federal prison space. Thus, the numbers in the projections presented below include projected increases in the demand for community corrections facilities.

2. Low-Growth Scenario

Table 4 provides 15-year prison population projections under the low-growth assumption. Projections are given both for existing sentencing practices (current practices and practices after the drug law) and future sentencing practices (career-offender and guidelines). Figure 3 depicts this same information graphically.

Without taking into account the effect of a full implementation of the new drug law, prison population under this low-growth scenario is projected to increase from its current level of 42,000 to 57,000 in 1992, to 61,000 in 1997, and to 65,000 in 2002. This constitutes a projected fifty-percent increase in prison population in the absence of any change in sentencing practices.

As Table 4 indicates, full implementation of the new drug law in itself will cause a substantial increase in prison populations over time. We project that prison population will increase from 57,000 to 67,000 in 1992, from 61,000 to 85,000 in 1997, and from 65,000 to 93,000 in 2002, simply from implementing the new drug law. The total projected increase from 42,000 in 1987 to 85,000 in 1997 underscores a significant point: a doubling of inmates over the next decade might be expected even under a low-growth assumption and even without sentencing guidelines.

Taking into account the career-offender provision in addition to the new drug law, prison population is projected to increase from 42,000 in 1987 to 68,000 in 1992, to 89,000 in 1997, and to 102,000 in 2002. Adding the effects of the guidelines into the analyses raises the projected prison population only slightly: to 72,000 in 1992, to 92,000 in 1997, and to 105,000 in 2002. This last calculation emphasizes an important point: the incremental effect of the guidelines is relatively modest, only about 6 percent in 1992, 3 percent in 1997, and 2 percent in 2002.

Aside from the impact that is created by the growth in prosecutions, the most significant factor in creating a demand for prison capacity will be the full implementation of the new drug law. On the other hand, at least over the next decade, both the career-offender provision and guidelines are likely to have relatively minor impacts on prison population.

3. High-Growth Scenario

The 15-year "high-growth" projections are set forth in Table 5 and Figure 4. Under the high-growth assumptions, prison population is expected to increase dramatically -- from 42,000 currently, to 62,000 in 1992, 78,000 in 1997 and 95,000 in 2002, even without a full implementation of the new drug law. If prosecutions increase at this high rate over the 15-year period, prison population could be expected to more than double without any change in sentencing practices.

These high-growth projections suggest that given current trends in prosecutions, future demands on the federal prisons will greatly exceed present prison capacity. While these projections may be viewed as the upper limit of future prison demand, they are not beyond the range of experience. Over the last 15 years, the total population in federal prisons has more than doubled, from over 20,000 to over 40,000. The growth in total population of state institutions has been even more pronounced, increasing by 184 percent over the same period.

Under this scenario, as under the low-growth scenario, the new drug law is projected to have a substantial effect on future prison population. Because of the drug law, prison population is projected to increase by 17 percent in 1992, 39 percent in 1997 and 46 percent in 2002. The effects of both the career-offender provision and the guidelines are small in comparison. The additional effect attributable to the guidelines is 7 percent in 1992, 4 percent in 1997, and 4 percent in 2002. Although, the impact of the guidelines is somewhat larger under this scenario than under the low-growth scenario, it is still relatively modest.

4. Impact on Community Corrections

Although the level of utilization is difficult to estimate reliably, it is clear that community corrections facilities will be used more heavily under the guidelines. This projected increase results from a projected decline in the use of straight probation, as well as from a projected increase in the length of sentences that might be served in community corrections facilities. We estimate that, had the offenders who were convicted during 1985 been sentenced under the guidelines, somewhat more than 2,500 would have received community or intermittent confinement. Approximately another 4,000 likely would have received split sentences. We estimate that these 6,500 offenders could have required 1,600 to 3,600 man-years of community correction facility space depending on the length of the sentences and the proportions of split sentences allocated to community facilities. This contrasts with approximately 800 man-years currently used for direct commitments from court and for commitments as a condition of probation. Assuming that the use of community corrections facilities as a transition from prison remains at current levels,[107] the total population of such facilities may increase to 4,000 to 6,000, from a current level of approximately 3,200.

I. Plea Agreements and Compliance with the Guidelines: Alternative Scenarios

Our basic approach has been to estimate prison impact under both low and high-growth scenarios assuming that: (1) judges will infrequently depart from the guidelines, and (2) future plea negotiations will approximate current practice in the proportion by which sentences are reduced for

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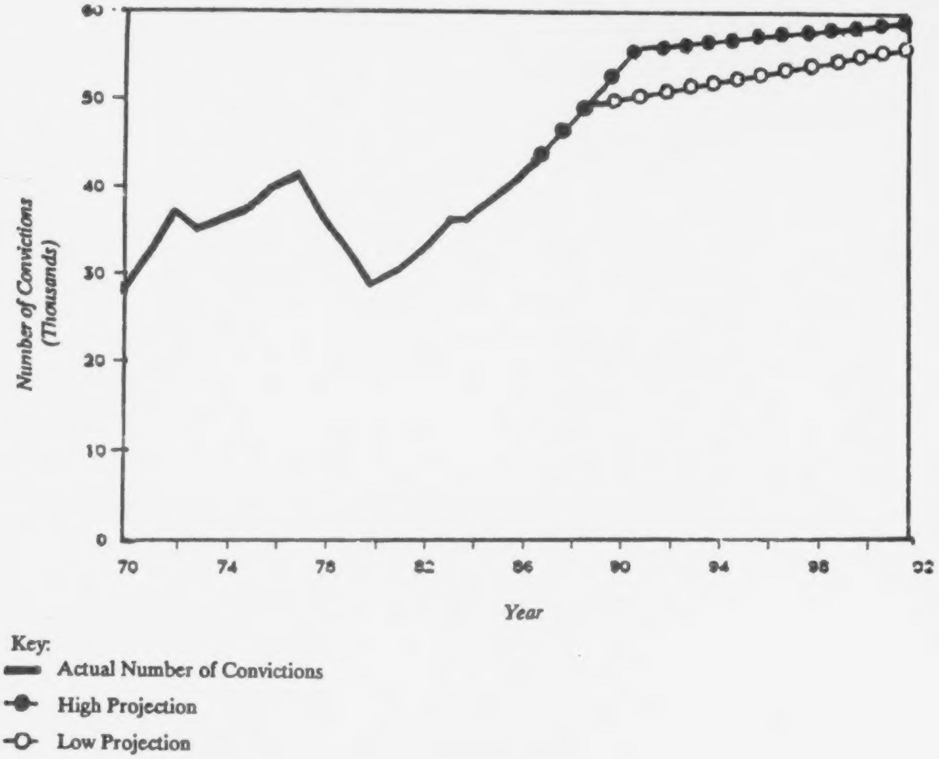
[107] The use of community corrections facilities as a transition from prison may change after the guidelines go into effect. New legislation, effective November 1, 1987, may decrease the length of the transition terms for which the Bureau of Prisons can utilize community corrections facilities. *See* 18 U.S.C. § 3624(c).

FIGURE 1 – ACTUAL AND PROJECTED CONVICTIONS BY YEAR



Notes

(1) For 1970-1976, the actual number of convictions is shown.

(2) For 1987-2002, a high growth and low growth projection of number of convictions is shown. For example, the projections for the years 1992, 1997, and 2002 are as follows:

Year	High Growth Projection	Low Growth Projection
1992	55,962	50,626
1997	57,414	53,206
2002	58,902	55,923

For 1987-1989, the high growth and low growth projections overlap.

(3) The high growth projections for 1987-92 are based on the average annual growth for 1982-1986. The high growth projections for 1993-2002 are based on the average annual growth that reproduces the same 15-year growth for 1987-2002 that was observed for 1971-1986.

(4) Low growth projections for 1987-1989 are based on the average annual growth for the years 1982-1986. Thereafter, the low growth projections assume that the criminal cases grow at a 1 percent yearly rate.

TABLE 2 -- PROBATION TERMS AND SPLIT SENTENCES BY OFFENSE TYPE

Percentage of Defendants Receiving Probation and Split Sentences

	Straight Probation		Probation with Confinement & Split Sentences		
	Under Current Practice	Under Guidelines	Under Current Practice	Under Guidelines (probation with custody)	Under Guidelines (split sentence equivalent)
Offense Type					
Person Offenses	31.4%	14.6%	10.0%	3.1%	7.7%
Robbery	18.0%	3.0%	8.0%	1.0%	1.0%
Burglary	64.0%	43.0%	10.0%	0.0%	2.0%
Property Offenses	60.1%	33.1%	15.2%	17.5%	18.1%
Drugs	20.8%	5.1%	13.0%	1.3%	6.9%
Fraud	59.0%	24.0%	18.0%	20.0%	21.0%
Income Taxes	57.0%	3.0%	25.0%	20.0%	36.0%
Firearms	37.0%	9.0%	15.0%	17.0%	16.0%
Immigration	41.0%	30.0%	27.0%	8.0%	28.0%

Notes:

(1) The term 'straight probation' means probation without any period of confinement.

(2) Under current practice, probation terms with confinement consist of probation terms with any form of incarceration: probation with jail as a condition, split sentences and mixed sentences.

(3) The term 'probation with custody' means probation with a condition requiring a period of intermittent confinement or residence in a community treatment center.

(4) The term 'split sentence equivalent' means a sentence under the guideline §5C2.1(c)(3) or (d)(2).

(5) The category labeled 'person offenses' includes homicide, assault, rape, and kidnapping.

(6) The category labeled 'property offenses' includes embezzlement, forgery, larceny, property destruction, counterfeiting and auto theft.

(7) The category labeled 'burglary' also includes trespass.

TABLE 3 -- TIME SERVED UNDER CURRENT PRACTICE AND PROJECTED TIME SERVED UNDER THE DRUG LAW, CAREER-OFFENDER PROVISION AND GUIDELINES

	Average Time Served (Imprisonment)			
	Present Practice		Future Practice	
Offense Type	Current Practice	Drug Law	Career Offender	Guidelines
Robbery	44.8	--	74.1	75.4
Person	37.7	--	53.3	75.2
Drugs	23.1	48.1	56.8	57.7
Firearms	14.1	--	--	15.2
Burglary	7.7	--	9.1	16.5
Fraud	7.0	--	--	8.0
Property	6.8	--	--	6.5
Immigration	5.7	--	--	5.2
Income tax	5.5	--	--	11.9

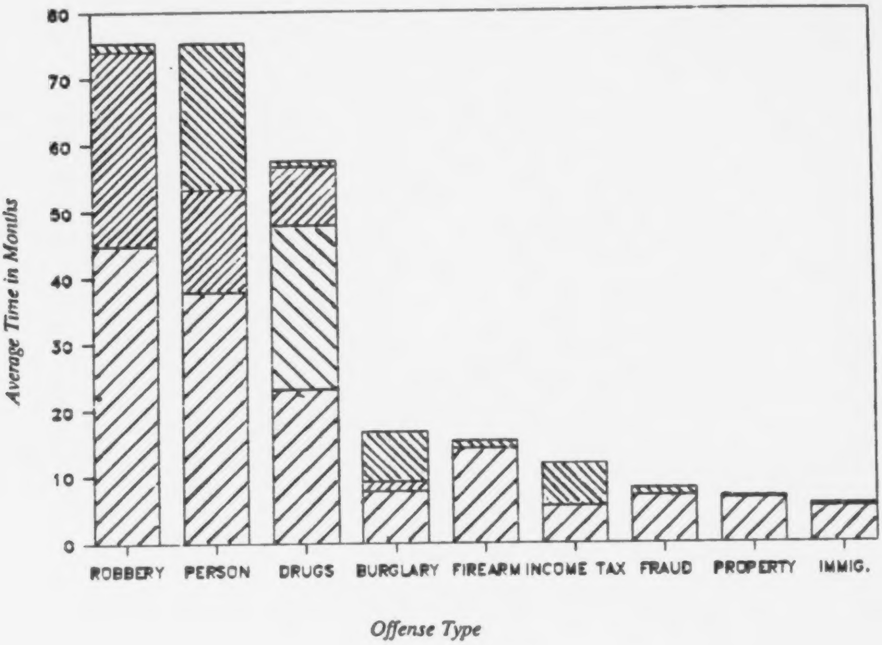
Notes:

(1) Average time served is based on sentences for all offenders. Offenders not sentenced to imprisonment are treated as having zero months imprisonment.

(2) The average time served reported in column two (drug law) and column three (career-offender provision) is for all offenders, not only offenders subject to the new drug law and the career-offender provision.

(3) Imprisonment includes confinement in prison, jail or a community corrections facility.

FIGURE 2 -- TIME SERVED UNDER CURRENT PRACTICES AND PROJECTED TIME SERVED UNDER THE DRUG LAW, CAREER-OFFENDER PROVISION AND GUIDELINES



Key:

▨ Current average term of imprisonment (time served)
▧ Additional time attributable to the drug law
▨ Additional time attributable to the career-offender provision
▧ Additional time attributable to the guidelines
■ Additional time attributable to the guidelines for property and immigration is negative

Notes:

(1) Average time served is reported for all offenders. Offenders not sentenced to prison are treated as having zero months imprisonment.

(2) Imprisonment includes both prison and jail confinement.

TABLE 4 -- PROJECTED GROWTH IN PRISON POPULATION: LOW-GROWTH SCENARIO

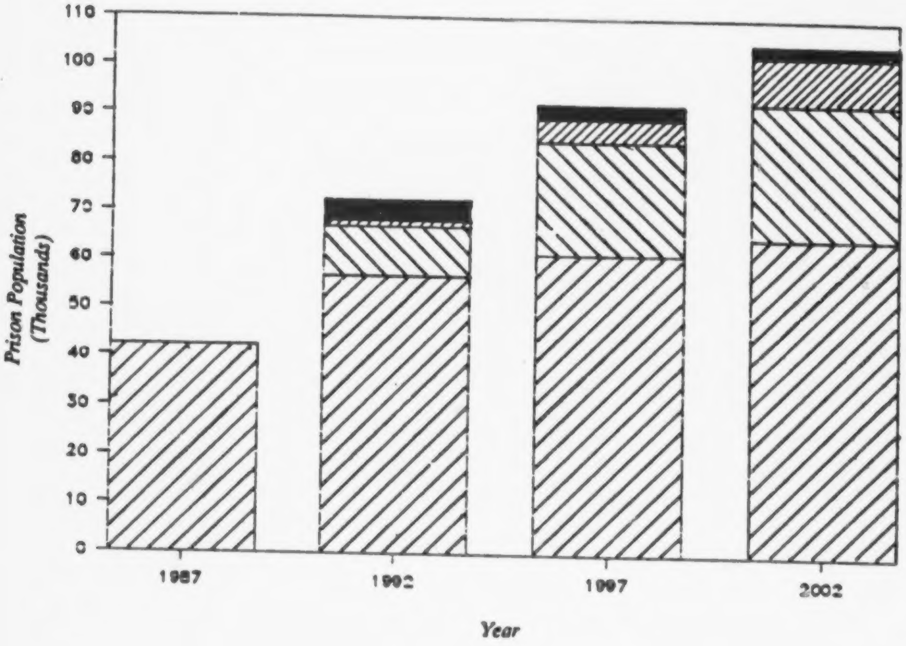
	Projected Prison Population by Year			
	1987	1992	1997	2002
Baseline	42,000	57,000	61,000	65,000
With Drug Law	N/A	67,000 (+18%)	85,000 (+38%)	93,000 (+44%)
With Career-Offender Provision	N/A	68,000 (+2%)	89,000 (+6%)	102,000 (+10%)
With Guidelines	N/A	72,000 (+6%)	92,000 (+3%)	105,000 (+2%)

__Notes:__

(1) The baseline projections for 1987-1989 are based on the average annual growth for the years 1982-1986. Thereafter, criminal cases were assumed to grow at a 1 percent rate.

(2) The percentage change is the increase relative to the previous estimate. The percentage change for the drug law is the change relative to the baseline. The percentage change for the career-offender provision is the change relative to the baseline plus the drug law. The percentage change for the guidelines is the change relative to the baseline plus the drug law and the career-offender provision.

FIGURE 3 -- PRISON POPULATION PROJECTIONS: LOW GROWTH SCENARIO



Key:

▨ Prison population attributable to current sentencing practices and growth in prosecutions

▧ Change attributable to the drug law

▨ Change attributable to the career-offender provision

■ Change attributable to the guidelines

TABLE 5 -- PROJECTED GROWTH IN PRISON POPULATION: HIGH GROWTH SCENARIO

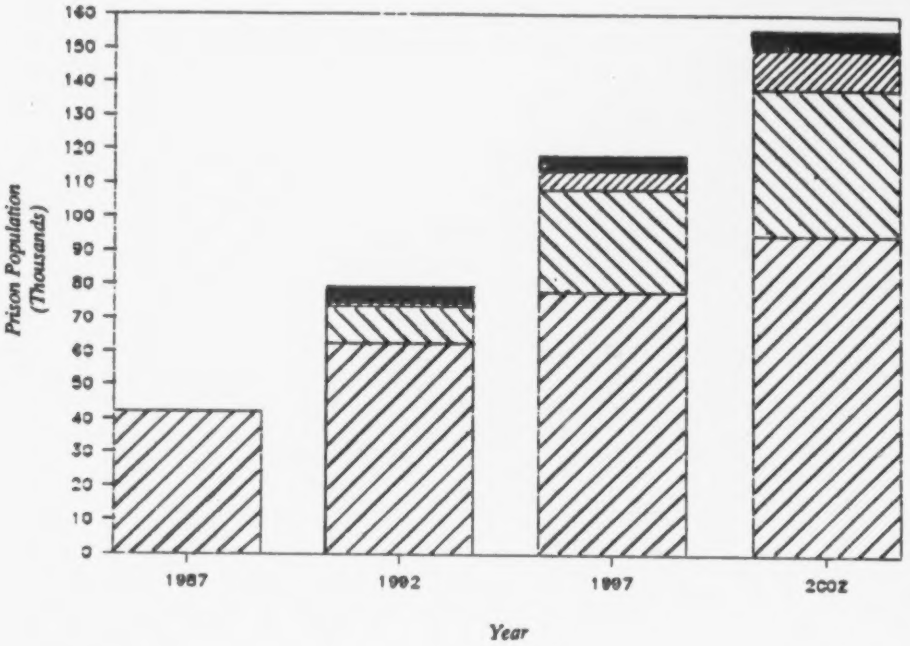
	Projected Prison Population by Year			
	1987	1992	1997	2002
Baseline	42,000	62,000	78,000	95,000
With Drug Law	N/A	73,000 (+17%)	108,000 (+39%)	138,000 (+46%)
With Career-Offender Provision	N/A	74,000 (+2%)	114,000 (+5%)	150,000 (+8%)
With Guidelines	N/A	79,000 (+7%)	118,000 (+4%)	156,000 (+4%)

Notes:

(1) The baseline projections for 1987-1991 are based on the average annual growth for 1982-1986. Projections for 1992-2002 are based on the average annual growth that reproduces the same 15-year percentage growth for 1987-2002 that was observed for 1971-1986.

(2) The percentage change is the increase relative to the previous estimate. The percentage change for the drug law is the change relative to the baseline. The percentage change for the career-offender provision is the change relative to the baseline plus the drug law. The percentage change for the guidelines is the change relative to the baseline plus the drug law and the career-offender provision.

FIGURE 4 – PRISON POPULATION PROJECTIONS: HIGH GROWTH SCENARIO



Key:
▨ Prison population attributable to current sentencing practices and growth in prosecutions
▧ Change attributable to the drug law
▩ Change attributable to the career-offender provision
■ Change attributable to the guidelines

TABLE 6 -- PROJECTED GROWTH IN PRISON POPULATION: RANGES FOR ALTERNATIVE DEPARTURE AND NEGOTIATION SCENARIOS

	Projected Prison Population By Year		
	1992	1997	2002
Negotiation Scenarios			
Low Growth			
Baseline Population	57,000	62,000	65,000
% change due to Drug Law	15-20%	27-43%	30-49%
% change due to Career-Offender	2%	6-7%	10%
% change due to Guidelines	4-9%	1-6%	0-5%
Projected Total Population	68-76,000	83-98,000	91-111,000
High Growth			
Baseline Population	63,000	78,000	95,000
% change due to Drug Law	14-19%	27-44%	32-52%
% change due to Career-Offender	2%	5%	7-8%
% change due to Guidelines	4-10%	4-6%	2-6%
Projected Total Population	72-83,000	107-125,000	136-165,000
Departure Scenarios			
Low Growth			
Baseline Population	57,000	62,000	65,000
% change due to Drug Law	14-18%	20-38%	22-44%
% change due to Career-Offender	2%	6%	8-10%
% change due to Guidelines	1-6%	(1)-3%	(2)-3%
Projected Total Population	67-73,000	78-92,000	83-105,000
High Growth			
Baseline Population	63,000	78,000	95,000
% change due to Drug Law	13-17%	22-39%	24-46%
% change due to Career-Offender	2%	5%	7-8%
% change due to Guidelines	3-7%	0-4%	(2)-4%
Projected Total Population	72-80,000	100-118,000	125-155,000

Notes:

(1) "Baseline Population" is the projected prison population based on current trends in prosecutions and convictions, as adjusted for high and low growth; and sentencing patterns that prevailed in 1985.

(2) The rows designated as "% change..." refer to the range of increase over the previous estimate. That is, the percentage change due to the drug law is the percentage change over the baseline. The percentage change due to the career-offender provision is percentage change over the baseline plus the drug law. The percentage change due to the guidelines is the percentage change over the baseline plus the drug law and career-offender provisions.

(3) "Projected Population" is the projected prison population after accounting for the baseline population, the drug law, the career-offender provision, and the guidelines.

(4) Numbers in parentheses () are negative.

Senator KENNEDY. Our next witness is the Assistant Attorney General for the Criminal Division, Mr. William Weld.

Mr. Weld, we are pleased to have you here to discuss this important topic. The integrity and nonpartisan leadership you displayed as a U.S. Attorney for Massachusetts are well remembered. We enjoyed the strong support the Justice Department has given to sentencing reform over the years. They've been very active, very involved, very constructive, very positive, very helpful to all of us, and we look forward to hearing from you today.

STATEMENT OF WILLIAM F. WELD, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. WELD. Thank you very much, Mr. Chairman. It's a pleasure for me to be here this morning to express the strong support of the Justice Department for the guidelines as drafted by the United States Sentencing Commission.

As Chairman Wilkins indicated, at this point it seems to us that the pertinent question is not whether the guidelines are perfect but rather whether they have addressed the problems which led to the Sentencing Reform Act of 1984 and the establishment of the Commission, and we think the answer to that question is yes, the guidelines go a long way toward eliminating the type of sentencing disparities which had led to the establishment of the Commission.

I think that the real time sentencing aspect of the new guidelines that promotes the goal of truth in sentencing was another important purpose of the statute for which people, most notably yourself, worked for a number of years, and I think that when the guidelines go into effect in areas such as repeat offenders, the special career criminal provisions of the guidelines will ensure that appropriately heavy sentences are parceled out.

I think that in the drug trafficking area where we desperately need sentences consistently heavy enough to deter a potential entrance into the drug trade, the guidelines are going to contribute toward that result. Perhaps most important of all to me personally, I think that in the white collar area, the area of white collar crime, public corruption and fraud cases, the application of the guidelines will increase the certainty of incarceration which, in the white collar area, is the most important aspect of sentencing.

That first day when the door clangs shut behind the white collar offenders, the most important day of the sentence for deterrence purposes, the Commission estimates that the percentage of cases which will involve no incarceration time is likely to drop from an average of 59 percent to 24 percent under the guidelines for white collar offenses.

So, as I say, I look forward very much to the implementation and application of the guidelines.

Appended to my statement is a draft bill, which I believe has been jointly worked out among the staffs of the Administrative Office of U.S. Courts and the staff of the Sentencing Commission, and our own staff in the Justice Department. My purpose is to summarize briefly the principal provisions of that bill.

Before doing do, in view of the concerns raised by Senator DeConcini, Senator Specter and Senator Metzenbaum, I think it might be in order for me just to say a word about the question of delay. It is not my purpose to resuscitate an issue which is dead, or hopefully dead, it's not my purpose to wave the bloody shirt.

I understand that extremely distinguished representatives of the Judiciary may testify later today in support of a delay. But I do want to make it plain on the record that the Justice Department has given this matter a lot of thought at the highest levels of the Department and throughout the Department, and we really are unalterably opposed to any legislation which would include, as a component, any delay whatsoever in the implementation of the guidelines. And I say that for a number of reasons.

Number one, we have waited a long time for these guidelines to go into effect, the passage of the 1984 legislation, as the Chairman knows, was an effort of many years, and we think the public is entitled to the benefit of the new law in terms of elimination of disparities and sentencing and promotion of the goal of truth in sentencing.

We feel that the best training for how to use these guidelines for court personnel and Assistant U.S. Attorneys will be experience. You can't swim until you get your feet wet.

We feel, as Judge Breyer has stated, that it will be possible for the judiciary to be prepared to implement these guidelines. I tend to agree with Judge Breyer that the principles can be absorbed in a matter of hours and, after that, it's really a matter of going through the process time and again to alert yourself to the fine points.

Judge Mazzone has indicated in a letter sent to the Justice Department in October that, even without a delay, the necessary instructional materials will be available for the courts. The videotapes have been prepared by the judiciary. We have ordered 150 copies for distribution to United States Attorneys Offices. I sent to the printer yesterday a Handbook for Assistant U.S. Attorneys which will be on the desk of every Assistant United States Attorney in the country on October 30.

Like the judges, we have already had some seminars, and we have major training sessions scheduled over the next month and a half. Our plan is to have a resident expert Assistant U.S. Attorney in each district who will be trained in Washington or wherever, and then carry the message back to the other Assistant U.S. Attorneys.

So we think the training problem can be addressed.

Another factor is the natural lag feature just mentioned by Commissioner Block. His projections are that approximately 2 percent of cases in the first month would involve the new guidelines, 8 percent in the second month, 16 percent in the third. So there is catch-up time built into the vagaries and natural delays of the criminal justice process.

Lastly, if a delay of implementation of the guidelines were, by any chance, to lead to placing into jeopardy the eventual going into effect of the guidelines, we believe that that would be a law enforcement disaster of the first magnitude.

So that having been said, let me, in just two minutes, mention the high points of the bill which, as I say, I believe to be a compromise vehicle for obviating ex post facto potential problems avoiding needless litigation or confusion and, perhaps not so incidently, cutting down the burden on the courts.

One of the provisions in the bill would make it explicit that this bill, the legislation and the guidelines, applies prospectively only, that's to cut out ex post facto challenges.

Probably the most important substantive provision is the standard for departure from the guidelines. Compromise language has been hammered out there. The amendment makes clear what we believe to have been the intent of Congress that a judge may depart from the guidelines if there's a compelling reason to do so, based on some factor not taken into account, adequately taken into consideration by the Commission.

In making that determination, you look just to the public record of writings. You don't subpoena the members of the Commission into court to ask them whether they adequately took something into consideration.

There are three sections in the bill that relate to appellate review providing due deference is to be given to the Trial Court's application of the guidelines, clarifying that there's a right to appeal a plainly unreasonable sentence for an offense for which there is no guideline, and requiring the Appellate Court to affirm a sentence if no specified ground exists for modifying it. I think this would be helpful in avoiding any undue burden on the Appellate docket over time.

Section 15 of the proposed bill relates to prison or transfers, avoids a problem that might arise where the legislation might be interpreted as being in conflict with prisoner transfer treaties that we have with other nations. The amendment makes it clear that, consistent with the treaty obligation, the overall sentence imposed may not be modified, although the portion of that sentence which is to be served in official custody may be modified.

Another important provision in the bill relates to petty offenses to make it plain that offenses, such as illegal entry or traffic violations, don't necessarily have to be sentenced under the guidelines. If all petty offenses had to go under the guidelines, that could clog the courts in certain districts, particularly those with large Federal reservations or those along the border where you'd have a lot of illegal entry cases. This provision would be of particular interest to Senator DeConcini, as Arizona certainly qualifies under both of those headings.

There is a provision in the bill designed to eliminate make work for judges to the effect that it's not necessary for them to include a statement of their reasons for the sentence if the sentence is within the guidelines. Since there is no appeal right anyway, there really wouldn't be too much point in requiring a statement of reasons under those circumstances.

Lastly, there's a provision, Section 24, which would give the Sentencing Commission authority to promulgate temporary guidelines where a guideline has been invalidated or where Congress has created a new offense or amended an existing offense or for other compelling reasons determined by the Commission.

So that's the bill, and the Justice Department is enthusiastically in favor of it on condition that, and only upon condition that, there be no delay in the going into effect of the guidelines.

Thank you very much.
[The statement of Mr. Weld follows:]

STATEMENT

OF

WILLIAM F. WELD
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE SENTENCING REFORM ACT OF 1984

ON

OCTOBER 22, 1987

Mr. Chairman and Members of the Judiciary Committee, I appreciate the opportunity to appear before this Committee to present the Justice Department's views on the Federal Sentencing Guidelines, which are scheduled to take effect November 1, 1987. The Justice Department strongly supports the Guidelines as drafted by the United States Sentencing Commission. As the Members of this Committee are aware, the Sentencing Reform Act of 1984 culminated over a decade of sustained effort by Congress and the Department of Justice to enact meaningful sentencing reform legislation. The Department believes that the Guidelines, as submitted to Congress last April, create a fair, workable, and rational sentencing structure which is far superior to the current indeterminate sentencing system and which goes a long way toward eliminating the kind of sentencing disparities, unpredictability and horror stories of unwarranted leniency that led to the passage of the Sentencing Reform Act.

As a former United States Attorney from Boston, I have shared the Committee's concern over the significant disparities that exist in sentences imposed on similarly situated defendants under the current sentencing system. I believe, as do the Members of this Committee, that greater consistency in sentencing both within particular judicial districts and among the various districts is highly desirable. The Sentencing Guidelines are an answer to this problem.

The Guidelines themselves will lead to greater consistency in sentencing and are sorely needed by law enforcement. Moreover the effective date of the Guidelines carries with it a variety of other badly needed reforms in the criminal justice system. The elimination of parole and the reduction in excessive "good time" that may be applied to prison sentences, for all offenses committed after November 1, 1987, and the curtailment of the broad opportunity for defendants to file motions to reduce a sentence -- all will contribute to the forging of a new system designed to create greater fairness and certainty in meting out appropriate sanctions for criminal misconduct. In addition, the basic requirement in the new Act that judges consider the statutorily enumerated purposes of sentencing, and the opportunity in some cases for appellate review of sentences imposed, are innovations that will significantly improve the sentencing process.

Because of our belief that it is important that our society begin to reap the substantial benefits of the new Act, the Department of Justice strongly opposed, and continues to oppose, any further delay in the implementation of the Sentencing Guidelines. Accordingly, we were gratified that the House of Representatives, on October 6, 1987, decisively rejected an effort to postpone the taking effect of the Guidelines.

Our view that the guidelines are deserving of approval and represent the advent of a new, vastly superior sentencing system is not premised on the view that the Guidelines are perfect. The Department has identified several areas in which we believe the Guidelines can and should be improved. Nevertheless, the question in our view is not whether the Guidelines can be improved. We agree with the following observations of the Commission when the Guidelines were promulgated on May 1, 1987:

> "[T]he issue is not whether the Commission's present draft has some anomalies or disparities; some will be found. Nor is it whether the Commission has created the theoretically or academically 'best' set of guidelines. The issue is whether we wish to perpetuate the current system, a system that creates anomalies and disparities daily by allowing each of hundreds of federal judges to sentence entirely on the basis of his or her own views. It is whether, with these initial guidelines, the Commission has laid a solid groundwork for further improvement and reform... These initial guidelines begin a process that will gradually but inevitably create an ever fairer and more effective criminal justice system."

In this regard, it is important to recognize that the Commission is an ongoing entity, with the authority to promulgate amendments that will take effect after six months. This authority can begin to be exercised as of January 1, 1988, and we have no doubt that the amendment process, illuminated by actual experience with the Guidelines, will over time produce substantial refinements and improvements in the Guidelines.

Nevertheless, even without the opportunity for further improvement, the Department perceives significant advantages from the standpoint of effective law enforcement that will result from application of the Guidelines in many types of cases. For example, a defendant, twice previously convicted of robbery, who robbed a bank of $5000 using a gun would today serve an average of approximately six years in prison. Under the Guidelines, which include a special career criminal provision requiring imposition of sentence at or near the maximum in such cases, a twenty-five year sentence would be imposed. In drug trafficking cases, where today many judges are imposing the bare mandatory minimum five or ten years sentence, the guidelines will call for sentences at considerably higher levels. The Guidelines will also mandate tough sentences for a number of serious drug crimes which do not carry mandatory minimum sentences under the present law such as conspiracy, attempt and distribution of certain dangerous drugs like methamphetamine. The Guidelines apply tough sentences based on quantity to all drugs. In the area of fraud, public corruption and other white collar crime the Guidelines will substantially reduce the incidence of probation without confinement -- according to the Commission's calculations from an average of 59% to 24% under the Guidelines. Thus, the Department of Justice welcomes the Guidelines. While inevitably, as with the Bail Reform statute implemented in 1984, there will be a period of adjustment as the Sentencing Guidelines take effect, we expect that the period of adjustment will be temporary, as compared with the benefits of the new system which will be longlasting or permanent.

We know that many members of this Committee played a leading role in the legislative efforts that have brought us to this historic point. We pledge the Department of Justice's continuing, maximum effort to see to it that the statute's promise of a better criminal justice system will be realized for all our citizens.

Mr. Chairman, the Department feels strongly that the Sentencing Guidelines are ready to be implemented and that nothing should impede or delay that result. To reiterate the Department's position, we would oppose any legislation that included a delay of the Guidelines component. On the assumption, however, that the issue of delay has been resolved and that the guidelines sentencing system will take effect as scheduled on November 1, 1987, we urge the Committee and the Congress expeditiously to turn their attention to improving the underlying statute so that the full benefits of the new system can be realized. During the 99th Congress, the Administration submitted a minor and technical amendments bill, S.1236, that was designed to clarify or correct a variety of provisions enacted in the Comprehensive Crime Control Act of 1984, including the Sentencing Reform Act of 1984 presently due to take effect. However, because of the perception last year that ample time remained to deal with the proposals in S. 1236 relating to sentencing, those matters were largely excised from the bill and consideration of them postponed to the current Session. Unfortunately, the press of other matters in the current Session and the focus, until very recently, on the delay issue, have again acted to forestall consideration of these sentencing issues.

Appended to my Statement is a draft bill, jointly worked out among the staffs of the Administrative Office of United States Courts, the Sentencing Commission, and the Department. It is my understanding that this consensus product has been informally provided to certain staff members of the Committee. Let me briefly describe the bill and highlight (with an asterisk) those provisions whose prompt enactment is most important in the interest of obviating ex post facto problems, correcting obvious anomalies, or avoiding needless confusion and litigation.

* Effective Date and Parole Matters

* Section 2 of the draft bill would accomplish three things. First, it would provide that, except for those parts of the Act that already are in effect, the entire Sentencing Reform Act shall apply only to offenses committed on or after the effective date. While we interpret both the ex post facto clause of the Constitution and the legislative history to require this result under the statute as it is, it may be helpful to make the operation of the statute explicitly prospective and to avoid debate about whether any part of the Act, e.g. fine collection, might have retroactive application.

Second, section 2 would replace ambiguous language in section 235(b)(3) of the Sentencing Reform Act, which calls upon the Parole Commission, before going out of existence, to set a "release date ... that is within the range that applies to the prisoner under the applicable parole guideline" for all prisoners then within its jurisdiction. If the words "within the range" are read as requiring the Commission to set a release date within the Commission's guidelines irrespective of the presently controlling statute, 18 U.S.C. 4206, under which the Commission for good cause may depart from its guidelines, then section 235(b)(3) would confer an unwarranted windfall on dangerous prisoners who would never be granted parole or whose presumptive release date would be deferred from that ordinarily provided by the Commission's guidelines. In both the Parole Commission's view and ours, that was not the intent of the Sentencing Reform Act. Rather the intent, which this amendment would clarify, was to have the Commission set a release date for all prisoners within its cognizance, under the same legal criteria that it would use if it were not going out of existence.

Third, section 2 of the draft bill improves the process by which the Parole Commission is phased out. This aspect is not time-urgent since the Commission is not due to go out of existence for five years after November 1. Nevertheless, we are hopeful the amendments can be adopted as noncontroversial. In essence, the Act presently calls for the Parole Commission, after five years, to cease its existence, with its final act being to set a presumptive release date for all prisoners then within its jurisdiction. Under the Act, no entity is to administer the parole laws after the Commission has vanished from the scene. Thus, although currently a prisoner is entitled to a periodic review of his or her parole status, no such process is provided under the Act for prisoners still in the system five years after November 1, 1987. Similarly, no mechanism exists for dealing with those individuals whose offenses were committed before November 1, 1987, but who are not convicted and sentenced until after the Commission has gone out of existence (e.g. because they were in a fugitive status for part of the time).

Under the proposed amendment, the Bureau of Prisons would be directed to assume the function of administering the parole laws for all these classes of persons, applying the regulations of the Parole Commission in effect on the date it went out of existence. The Bureau would not be empowered to modify the substantive standards set by the Commission for determining parole eligibility but would simply act as a successor body to administer the parole laws until all persons entitled to their application were processed. This more orderly phase-out represents a clear improvement from the standpoint of fairness over the more arbitrary phase-out procedure in the present Act and deserves to be enacted.

* Standard for Departure

* Section 3 of the draft bill adjusts the standard for departure from the guidelines set forth in 18 U.S.C. 3553(b), so as to clarify that courts are not to countenance attempts to subpoena members or records of the Sentencing Commission in order to determine whether the Commission has "adequately taken into consideration" a particular aggravating or mitigating factor asserted as the basis for departure from the guidelines. Rather, the amendment makes clear, as we believe was Congress's original intent, that only the official published writings of the Commission are to be looked to in determining whether the Commission considered a factor, that is, the guidelines themselves, the commentary thereto, and the policy statements. The amendment also clarifies the departure standard itself, requiring a compelling reason for imposing a sentence different from that prescribed by the guidelines in order to meet the purposes of sentencing in the Act.

Appeal from Magistrate

Section 4 fills a gap in the Act by providing a procedure for appealing a sentence imposed by a magistrate.

Appellate Review

Sections 5-7 make a series of needed clarifications to the appellate review provisions, providing that "due deference" is to be accorded the trial court's application of the guidelines to the facts, clarifying that a right exists to appeal a "plainly unreasonable" sentence for an offense for which there is no applicable guideline, and requiring the appellate court to affirm a sentence if no specified ground exists for modifying it.

Probation

Section 8 corrects an inadvertent error in the Act relating to the prohibition of probation for the most serious felonies. Under the amendment, this prohibition would apply only to individual defendants. The sanction of probation as to organizational defendants, which of course cannot be imprisoned, should continue to be available for the most serious offenses felonies just as it is for lesser crimes.

* Supervised Release

* Section 9 would extend the maximum terms of supervised release from three to five years for a Class A or B felony and from two to three years for a Class C or D felony. The primary reason for this amendment is simply that the periods presently provided will be inadequate to accomplish their rehabilitative and protective purpose. A number of studies have shown that the need for supervision in order to reduce the risk of recidivism

often occurs well beyond the periods provided under the Act, particularly for substance abusers and mentally disordered violent offenders. Likewise, it is anomalous that the current terms of supervised release applicable to persons returning to society after a period of confinement are substantially less than the five-year period in which less dangerous offenders may be supervised on probation. The amendment would more nearly conform the maximum terms of supervised release to that authorized for probation.

Protection of the Public

Section 10 would correct a drafting error in the Act under which protection of the public is excluded (despite reference to the protective purpose in the legislative history) as a relevant factor in deciding whether to impose a term of supervised release.

Notice to the Government

Sections 11-13 make procedural modifications designed to require notice to the government when the court proposes to make changes favorable to the defendant relating to the conditions or term of probation and supervised release, and to avoid the need for a hearing if the government consents.

Restitution

Section 14 is a similarly quasi-technical amendment eliminating incongruities in 18 U.S.C. 3663(g) with respect to the range of sanctions available to the court if the defendant violates a condition of probation or supervised release that he make restitution.

* Prisoner Transfers

* Section 15 is a relatively complicated provision but one that is important, since it relates to the implementation of our prisoner transfer treaties under the new guidelines. With a single, minor exception, the proposed amendment is identical to one that passed the Senate in S. 1236 last Congress. Its enactment in the near future is desirable to avoid potential uncertainty regarding ex post facto problems as to United States citizens convicted in a foreign country who seek, after November 1, 1987, under the applicable treaty, to serve their sentence in the United States.

Under the majority of our prisoner transfer treaties (those with Mexico, Canada, Panama, Peru, and Bolivia), the United States may not modify the sentence imposed by the foreign court, but may reduce the portion of the sentence to be served in official detention through application of the laws related to parole or conditional release. In light of the abolition of parole, the Sentencing Reform Act amended 18 U.S.C. 4106(b), which permits the parole of transferred offenders in the same manner as persons sentenced by a United States court, to provide that a transferred prisoner is to be released after serving the term of imprisonment specified in the applicable sentencing guidelines. Whether the prisoner would be required to serve any of the remainder of the sentence imposed by the foreign court under supervised release would depend on the applicable guideline.

Since application of this amendment could, in certain circumstances, result in modification of the term of sentence imposed by the foreign court, rather than simply a reduction of the portion of that sentence to be served in official custody, the Sentencing Reform Act's amendment of 18 U.S.C. 4106(b) could be viewed as violative of a number of our prisoner transfer treaties. Thus, the proposed amendment makes it clear that, consistent with our treaty obligations, the overall sentence imposed may not be modified, but only the portion of that sentence which is to be served in official custody. In sum, the amendment continues current practice mandated by our treaties and simply substitutes the concept of supervised release for that of parole. The amendment also makes it clear that the sentencing guidelines may not be applied to result in an increase of the sentence imposed by the foreign court. In cases in which the sentence imposed by the foreign court is less than or equal to the maximum specified in the applicable guidelines, the prisoner would serve the sentence imposed by the foreign court, in accordance with 18 U.S.C. 4105(a).

Under the proposed amendment the Bureau of Prisons would make the determination as to what constitutes a crime equivalent to the one of which the offender was convicted in the foreign country and as to relevant offender characteristics for purposes of determining the applicable maximum term of imprisonment specified in the guidelines. The Bureau of Prisons is to make this determination upon the recommendation of the United States Probation Service, the agency (apart from the courts) with perhaps the greatest expertise in guidelines application. This is the one addition to the amendment previously approved by the Senate in S. 1236. The amendment also provides for an internal appeal within the Bureau of Prisons of such a determination by a reviewing authority to be established by the Director pursuant to regulations.

The Sentencing Reform Act's amendment of 18 U.S.C. 4106 also provided that the right to appeal a sentence under 18 U.S.C. 3742 would apply to sentences imposed on transferred prisoners. Whether such an appeal would apply in the case of a transferred prisoner depends on the nuances of the applicable treaty. Thus, to bring the statute and the treaties into conformity, this amendment provides that, to the extent permitted by the applicable treaty, a final determination by the Bureau of Prisons as to whether a transferred prisoner shall serve a term of supervised release and the length of such term may be appealed to the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States and that the appeal shall be decided in accordance with section 3742.

Relief from Disabilities

Section 16 corrects an inequity with respect to the procedure by which persons convicted of certain State or federal crimes and consequently subject to statutory disabilities, pursuant to the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)), with respect to employment in labor unions, employee pension and welfare benefit plans, employer associations, and labor relations consultants, can seek relief from such disabilities. Presently, the United States Parole Commission determines actions brought by convicted individuals under the cited statutes for relief from the above disabilities. Section 229 of the Comprehensive Crime Control Act of 1984 amended these provisions to take account of the future demise of the Parole Commission stemming from the enactment of the Sentencing Reform Act of 1984, so as to transfer from the Parole Commission to the federal courts the function of determining actions for relief from these disabilities. In doing so, section 229(a) (currently scheduled to take effect on November 1, 1987) provided that the convicted persons may apply for relief from the disabilities enumerated under 29 U.S.C. 504(a) and 1111(a) to the sentencing judge in the case of a federal offense, or, in the case of a State or local offense, "on motion of the United States Department of Justice," to the federal district court for the district in which the offense was committed. The court is to make its determination on the basis of sentencing guidelines and policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

The problem created by section 229(a) is that, under a literal reading, the ability of a disqualified State offender, as contrasted with a disqualified federal offender, to apply for judicial relief is dependent on the discretion of the Department of Justice, despite the otherwise equal treatment afforded to State and federal offenders by the statutory schemes which section 229(a) amended.

The amendment would remove this inequity by striking from section 229(a) the language requiring that the State offenders' applications for relief be filed "on motion of the United States Department of Justice:. The deletion would mean that State offenders, like their federal counterparts, would have a right to seek redress from the disabilities imposed under 29 U.S.C. 504(a) and 1111(a) from the federal courts.

* Petty offenses

* Section 17 would eliminate the requirement that the Commission promulgate guidelines for petty offenses and the concomitant requirement that judges submit a report to the Sentencing Commission detailing each sentence handed down for a petty offense. Approximately sixty percent of all federal prosecutions occur in connection with petty offenses (i.e. Class B or C misdemeanors or infractions) in magistrates' courts. Typically, as with illegal entry and traffic violations, these are currently handled expeditiously at the sentencing stage. The burden of applying the guideline system, with its normal requirement of a presentence report, to all petty offense cases would be severe and could adversely affect the administration of justice in certain districts, particularly those with large federal reservations or in border areas. Accordingly, this amendment would delete any requirement that the Commission promulgate guidelines for petty offenses. Sentences would still have to be imposed consistent with the purposes of sentencing under the Act and appeal would be available for a plainly unreasonable sentence. Moreover, the Commission would retain the prerogative

of issuing guidelines for some petty offenses, such as simple assault and trespass as to which guidelines have already been formulated.

* Statement of Reasons

* Section 18 would eliminate the requirement that trial judges state reasons for choosing a point within the prescribed sentencing range. The present requirement for judges to state reasons for electing a particular point within the sentencing range (18 U.S.C. 3553(c)) is of minimal value to the system, since no appeal rights exist for a within-the-guidelines sentence, and at the same time is extremely burdensome to the courts. In addition, deleting the requirement may provide a further incentive for judges to impose a guideline sentence rather than depart, a result also in keeping with the objectives of the Act.

Community Corrections Facilities

Section 19 would clarify that the Bureau of Prisons has authority to accept and pay for court commitments to community corrections facilities that are maintained or contracted for by the Bureau of Prisons, when such commitments are a condition of probation. This is believed to be consistent with the original intent of the Act, but the fact that the Bureau is mentioned in the preceding paragraph of the statute (18 U.S.C. 3563(b)(11)) and not in the paragraph dealing with community corrections facilities (section 3563(b)(12)) gives rise to an ambiguity which this amendment would remove.

Maximum Penalties Report

Section 20 would postpone the date for the Sentencing Commission to submit a report to Congress recommending any changes in the maximum penalties applicable for offenses in the United States Code. The current deadline is November 1, 1988. It is believed that the Commission cannot reasonably perform this task in the period set forth. Under the amendment, the Commission would have four years after the taking effect of the guidelines to submit the report, the same period provided to the GAO under section 236(a)(1) of the Act to prepare and submit a report to Congress on the operation of the guidelines system.

Petitions to Change Guidelines

Section 21 would eliminate a requirement that the Sentencing Commission respond to each and every defendant petition to change the guidelines. Under 28 U.S.C. 994(s) defendants are permitted to petition the Commission to change the guidelines utilized in their sentence, but only "on the basis of changed circumstances unrelated to the defendant" such as a change in the community's view of the gravity of the offense. The Commission is required to give "due consideration" to such petitions. These aspects of section 994(s) would remain unaffected by the amendment. The amendment would, however, delete the requirements that the Commission within 180 days provide written notice to the defendant whether it has approved the petition, including a statement of reasons in the event of disapproval, and that it file an annual report to Congress analyzing these written notices. These requirements are potentially very burdensome to the Commission and carry a correspondingly small benefit to the petitioning defendant.

Appointment of Counsel

Section 22 would provide authority for the appointment of counsel at government expense to indigent defendants when faced with a charge of a violation of supervised release or a proceeding to enlarge or revoke a term of supervised release.

Psychiatric Case

Section 23 would give the Director of the Administrative Office of United States Courts authority to contract with public or private agencies or persons with respect to the provision of psychiatric aftercare for convicted offenders.

* Temporary Guidelines Authority

* Section 24 would give the Sentencing Commission authority, under certain emergency circumstances, to promulgate a temporary guideline. The circumstances in which this authority would exist are where a guideline has been invalidated, where Congress has created a new offense or amended an existing offense, or for other urgent and compelling reason determined by the Commission relating to the application of a previously established guideline.

Effective Date of Amendments

Section 25 would provide an effective date for these amendments of the later of the date of enactment or the effective date of the initial set of sentencing guidelines.

Mr. Chairman, enactment of these amendments as promptly as possible would in our judgment significantly improve the operation of the Sentencing Reform Act and permit its anticipated benefits to be more fully effectuated. We know that you, as one who labored long and hard to achieve enactment of the Act in 1984, share this goal, and we stand ready to work with you and committee staff on this matter.

APPENDIX

SECTION 1. SHORT TITLE

This Act may be cited as the "Sentencing Act of 1987".

SEC. 2. (a) AMENDMENTS RELATING TO EFFECTIVE DATE OF SENTENCING REFORM ACT AND PHASE-OUT OF PAROLE. -- Section 235(b) of the Comprehensive Crime Control Act of 1984 is amended by striking out paragraphs (1) through (4) and inserting in lieu thereof the following:

"(1) Except as provided in this subsection, the amendments made by this chapter shall not apply to an offense committed before the effective dates set forth in subsection (a).

"(2) The United States Parole Commission shall be abolished effective September 30, 1992. The Parole Commission shall have no jurisdiction over an offender who is sentenced after May 31, 1992, who violates a condition of parole after that date, or who is transferred to the United States pursuant to chapter 306 of title 18, United States Code, after that date. The Parole Commission shall not revise its guidelines in effect on March 31, 1992. No later than May 15, 1992, the Commission shall set a presumptive release date pursuant to section 4206 of title 18, United States Code, for each prisoner who will be in its jurisdiction on September 30, 1992.

"(3) After September 30, 1992, the Bureau of Prisons may, in accord with applicable regulations of the Parole Commission in effect on March 31, 1992, adjust the release date and impose or modify conditions of release for a prisoner who had been in the jurisdiction of the Parole Commission on September 30, 1992. The Director of the Bureau of Prisons is authorized to promulgate such regulations as may be necessary to implement the provisions of this subsection. The regulations shall provide the same substantive rights to prisoners as were provided under the Parole Commission regulations in effect on March 31, 1992, but may provide different procedural mechanisms to implement those rights.

"(4) The court which imposed sentence shall set a presumptive release date and the conditions of release in accord with the applicable parole guidelines in effect on March 31, 1992, with respect to an offense committed before the effective dates set forth in subsection (a)(1)(B)(ii) in the case of --

"(A) a defendant sentenced after March 31, 1992, or

"(B) any other defendant for whom the Parole Commission has not on or before May 15, 1992, set a presumptive release date.

The determination with respect to a defendant described in subparagraph (A) shall be made at the time of sentencing. The Bureau of Prisons may adjust the release date and modify the conditions of release in accord with its regulations promulgated under paragraph (3).

"(5) If a defendant who is on parole violates a condition of release after March 31, 1992, the United States district court for the district to which the defendant has been paroled may revoke parole or amend the conditions of release in accord with the regulations of the Parole Commission in effect on March 31, 1992, or may transfer jurisdiction in the interest of justice to any other district court, which may take such action as provided by this paragraph. The court may set the date of reparole and the conditions of release in accord with those regulations. The Bureau of Prisons may adjust the release date and may impose or modify the conditions of release in accord with its regulations promulgated under paragraph (3).

"(6) The Bureau of Prisons shall set a presumptive release date in accord with its regulations promulgated under paragraph (3), for an offender serving a sentence of imprisonment in a foreign country for an offense committed before the effective date set forth in subsection (a)(1)(B)(ii) if the offender is transferred to the United States pursuant to chapter 306 of title 18, United States Code, after March 31, 1992. The Bureau of Prisons may adjust the release date and impose or modify conditions of release for such an offender in accord with its regulations.

"(7) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect the day before the effective date set forth in subsection (a)(1)(B)(ii), the term of office of a Commissioner who is in office on the effective date is extended through

September 30, 1992. A vacancy on the Commission may be filled in accord with section 4202, except that the term of office will end September 30, 1992.".

(b) Paragraph (5) of section 235(b) of the Comprehensive Crime Control Act of 1984 is redesignated as paragraph (8) and is further amended by --

(1) striking out "until the expiration of the five year period following the effective date of this Act" and inserting in lieu thereof "from the effective date of this chapter until September 30, 1992"; and

(2) striking out the phrase "during the five-year period" both places it appears and inserting in lieu thereof "during this period".

SEC. 3. STANDARD FOR DEPARTURE.

Section 3553(b) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The court shall impose a sentence of the kind, and within the range, set forth in the applicable sentencing guideline unless the court finds there is present in the case an aggravating or mitigating circumstance of a kind or degree that (1) provides a compelling reason for imposing a sentence different from a sentence called for by such guideline in order to meet the purposes of sentencing set forth in subsection (a)(2) and (2) is not expressly addressed in the guidelines, policy statements, and official commentary. In making this determination, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.".

SEC. 4. PROCEDURE FOR APPEALING SENTENCE IMPOSED BY A MAGISTRATE. -- Section 3742 of title 18, United States Code, is amended by adding at the end thereof the following:

"(f) Application to a sentence by a magistrate.-- An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and the provisions of this section shall apply as though the appeal were to a court of appeals from a sentence imposed by a district court.".

SEC. 5. MODIFICATION OF STANDARD OF APPELLATE REVIEW.-- Section 3742 of title 18, United States Code, is further amended in the second sentence of subsection (d) by inserting before the period "and shall give due deference to the district court's application of the guidelines to the facts".

SEC. 6. REVIEW OF A SENTENCE FOR WHICH THERE IS NO APPLICABLE GUIDELINE. -- Section 3742 of title 18, United States Code, is further amended --

(1) in subsections (a)(4) and (b)(4) by inserting "plainly unreasonable or" before "greater than" and by striking ", if any,";

(2) in subsection (d) by striking out "or" at the end of paragraph (2); striking out the period at the end of paragraph (3) and inserting in lieu thereof ";or"; and by inserting after paragraph (3) the following new paragraph:

"(3) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable."; and

(4) in subsection (e)(2) by inserting "or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable," after "is outside the range of the applicable sentencing guideline and is unreasonable".

SEC. 7. CLARIFICATION OF BASIS FOR AFFIRMING AN APPEAL. -- Section 3742 of title 18, United States Code, is further amended by making subsection (e)(3) read as follows:

"(3) is not described in paragraph (1) or (2), it shall affirm the sentence.".

SEC. 8. CORRECTION OF PROBATION EXCLUSION FOR ORGANIZATIONS CONVICTED OF SERIOUS OFFENSES. -- Section 3561(a)(1) of title 18, United States Code, is amended by inserting "and the defendant is an individual" after "the offense is a Class A or Class B felony".

SEC. 9. EXTENSION OF MAXIMUM TERMS OF SUPERVISED RELEASE. -- Section 3583(b) of title 18, United States Code, is amended --

(1) in paragraph (1) by striking out "three years" and inserting in lieu thereof "five years"; and

(2) in paragraph (2) by striking out "two years" and inserting in lieu thereof "three years".

SEC. 10. INCLUSION OF PROTECTION OF PUBLIC AS FACTOR IN DECIDING WHETHER TO IMPOSE SUPERVISED RELEASE. -- Section 3583(c) of title

18, United States Code, is amended by inserting "(a)(2)(C)," after "(a)(2)(B),".

SEC. 11. CLARIFICATION OF PROCEDURE FOR MODIFYING CONDITIONS OF PROBATION. -- Section 3563(c) of title 18, United States Code, is amended by striking out "revocation or modification of probation" and inserting in lieu thereof "the modification of probation and".

SEC. 12. CLARIFICATION OF PROCEDURE FOR EARLY TERMINATION OF PROBATION. -- Section 3564(c) of title 18, United States Code, is amended by inserting ", pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation," after "may".

SEC. 13. CLARIFICATION OF PROCEDURE FOR EARLY TERMINATION OF SUPERVISED RELEASE. -- Section 3583(e) of title 18, United States Code, is amended --

(1) in paragraph (1) by inserting "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation," after "one year of supervised release,"; and

(2) in paragraph (2) by striking out "after a hearing," and by inserting "the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and" after "pursuant to".

SEC. 14. REMEDIES FOR FAILURE TO PAY RESTITUTION. -- Section 3663(g) of title 18, United States Code, is amended in each of the second and third sentences by inserting "or a term of supervised release" after "probation" and by inserting "probation or" after "conditions of".

SEC. 15. DETERMINATION OF GUIDELINE SENTENCE FOR PRISONERS TRANSFERRED PURSUANT TO TREATY FROM FOREIGN COUNTRIES. -- Section 4106(b) of title 18, United States Code, is amended to read as follows:

> (b) An offender transferred to the United States to serve a sentence of imprisonment that is longer than the maximum period of time specified in the applicable sentencing guideline promulgated pursuant to section 994(a)(1) of title 28, United States Code, as determined by the Bureau of Prisons upon the recommendation of the United States Probation Service, shall serve in an official detention facility the maximum period of time specified in the applicable sentencing guideline and shall serve the remainder of the term imposed as a term of supervised release. To the extent permitted by the applicable treaty, a final determination by the Bureau of Prisons as to whether the transferred offender shall serve a term of supervised release and the length of such term may be appealed to the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States, and the court of appeals shall decide and dispose of the appeal in accordance with section 3742 as though the determination appealed had been imposed by the United States district court. A determination by the Bureau of Prisons shall be made only after affording the transferred offender an opportunity (1) to

submit evidence or information as to the applicable sentencing guideline, and (2) for an appeal within the Bureau of Prisons of such determination by a reviewing authority established by the Director pursuant to regulations.".

SEC. 16. PROCEDURE FOR RELIEF OF LABOR DISABILITIES FOLLOWING CONVICTION. -- Section 229(a) of the Comprehensive Crime Control Act of 1984 is amended by striking out "on motion of the United States Department of Justice,".

SEC. 17. (a) ELIMINATION OF REQUIREMENT FOR PETTY OFFENSE GUIDELINES. -- Section 3553(b) of title 18, United States Code, is amended by adding at the end the following: "If there is no applicable sentencing guideline and the offense is classified as a Class B or C misdemeanor or an infraction, the court shall impose an appropriate sentence having due regard for the purposes of sentencing set forth in subsection (a)(2)."

(b) CONFORMING AMENDMENT. -- Section 994(w) of title 28, United States Code, is amended by inserting after "each sentence imposed" the phrase ", except in the case of a sentence imposed for a Class B or C misdemeanor or an infraction for which there is no applicable sentencing guideline,".

SEC. 18. ELIMINATION OF REQUIREMENT OF STATING REASONS FOR CHOOSING A POINT WITHIN THE PRESCRIBED SENTENCING RANGE. -- Section 3553(c) of title 18, United States Code is amended by striking" -- (1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or (2)".

SEC. 19. CLARIFICATION OF AUTHORITY OF BUREAU OF PRISONS TO ACCEPT COMMITMENTS TO ITS COMMUNITY CORRECTIONS FACILITY AS CONDITION OF PROBATION OR SUPERVISED RELEASE. -- Section 3563(b)(12) of title 18, United States Code, is amended by inserting after "community corrections facility" the phrase ", which facility may be one maintained or contracted by the Bureau of Prisons provided that the Director indicates that adequate space and suitable programs for the defendant are available at the facility,".

SEC. 20. POSTPONEMENT OF DEADLINE FOR COMMISSION REPORT MAKING RECOMMENDATIONS ON THE GRADING AND PENALTIES FOR OFFENSES. -- Section 994(r) of title 28, United States Code, is amended by striking "one year" and inserting in lieu thereof "four years".

SEC. 21. ELIMINATION OF REQUIREMENT THAT SENTENCING COMMISSION RESPOND TO DEFENDANT PETITIONS FOR GUIDELINES MODIFICATIONS. -- Section 994(s) of title 28, United States Code, is amended by striking out the final three sentences.

SEC. 22. APPOINTMENT OF COUNSEL IN RELATION TO SUPERVISED RELEASE. -- Section 223(e) of the Comprehensive Crime Control Act of 1984, as amended by section 103 of the Criminal Justice Act Revisions of 1986, is further amended by striking paragraph (2) and inserting in lieu thereof the following new paragraph (2):

"(2) in paragraph (1) by striking out subparagraph (e) and inserting in lieu thereof the following new subparagraph (E) --

"(E) is charged with a violation of supervised release or faces modification, reduction or enlargement of a condition, or extension or revocation of a term of supervised release;".

SEC. 23. AUTHORITY OF DIRECTOR OF ADMINISTRATIVE OFFICE OF UNITED STATES COURTS TO CONTRACT FOR PSYCHIATRIC AFTERCARE. -- Section 3672 of title 18, United States Code, is amended --

(1) in the seventh paragraph to read as follows:

"He shall have the authority to contract with any appropriate public or private agency or person for the detection of and care in the community of an offender who is an alcohol-dependent person, an addict or a drug-dependent person, or a person suffering from a psychiatric disorder within the meaning of section 2 of the Public Health Service Act (42 U.S.C. 201). This authority shall include the authority to provide equipment and supplies; testing; medical, educational, social, psychological and vocational services; corrective and preventative guidance and training; and other rehabilitative services designed to protect the public and benefit the alcohol-dependent person, addict or drug-dependent person, or a person suffering from a psychiatric disorder by eliminating his dependence on alcohol or addicting drugs, by controlling his dependence and his susceptibility to addiction, or by treating his psychiatric disorder. He may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5)."; and

(2) by adding the following new paragraph at the end thereof:

"Whenever the court finds that funds are available for payment by or on behalf of a person furnished such services, training or guidance, the court may direct that such funds be paid to the Director. Any moneys collected under this paragraph shall be used to reimburse the appropriations obligated and disbursed in payment for such services, training or guidance.".

SEC. 24. EMERGENCY GUIDELINES PROMULGATION AUTHORITY. -- Section 994(a) of title 28, United States Code, is amended --

(1) by striking "and" at the end of paragraph (2);

(2) by striking the period at the end of paragraph (3) and inserting in lieu thereof "; and"; and

(3) by adding a new paragraph (4) as follows:

"(4) in the case of an invalidated guideline, the creation of a new offense or amendment of an existing offense, or for other urgent and compelling reason determined by the Commission relating to the application of a previously established guideline, a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress pursuant to subsection (p) of this section.".

SEC. 25. GENERAL EFFECTIVE DATE. -- This Act shall take effect upon the date of enactment or the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code, whichever occurs later.

SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS FOR ASSISTANT ATTORNEY GENERAL WELD

1. The guidelines are going to have an impact on virtually every person sentenced for a serious federal offense. The Sentencing Commission estimates that more than 2,000 people will have been sentenced under the new law by the time it has been in effect eight months. All of those people will have to be re-sentenced if the guidelines are for some reason found to be unconstitutional.

a. In light of that, would it be desireable to enact a provision for expedited appellate review of constitutional challenges to the guidelines?

b. Would it be possible to draft the provision to narrow the grounds on which a direct appeal could be taken?

Plea Bargaining

2. There is a great deal of uncertainty regarding the way plea bargaining may change under the sentencing guidelines. I understand that the Department of Justice is preparing to issue instructions to the U.S. Attorneys regarding plea bargaining under the new system.

a. Can you please summarize what those instructions will be?

b. So in a case where the prosecutor and the defense attorney are agreed that, say, three years would be an appropriate sentence, but the applicable guideline says that the sentence should be at least six years, how will the government present the plea to the court? Will the prosecutor present a version of the facts that would bring the sentence down to three years, or will he ask the court to depart from the guidelines?

c. In the latter case, what would the ground for departure be? Would there be a ground for departure, or would the government merely be assuming that no one would appeal a sentence outside of the guidelines in that instance?

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 04 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I appreciated the opportunity to appear before the Judiciary Committee on October 22 regarding sentencing matters. The following responds to your letter of October 28, enclosing questions submitted by members of the Committee regarding my testimony. Each question is paraphrased below and is followed by the response.

1. Expedited Appellate Review

a. Would it be desirable to enact a provision for expedited appellate review of constitutional challenges to the sentencing guidelines?

We oppose the enactment of a provision for expedited appellate review of such constitutional challenges. First, while it is difficult to predict the outcome of any constitutional litigation with any degree of certainty, we do not believe that the validity of the sentencing scheme under the Sentencing Reform Act of 1984 is so doubtful that massive re-sentencing would be required. Extraordinary measures, such as expedited appellate review, should only be authorized where there is a great likelihood that a scheme will be invalidated in such a manner that significant disruption would result. Moreover, the constitutional issues surrounding the sentencing scheme, while significant, do not rise to the level of those involved in the one-house veto, for example, which was the subject of expedited review in the past.

Another important reason why we do not favor the enactment of an expedited review procedure is that courts can and do act expeditiously when circumstances dictate, even without a statutory obligation to do so. This normal review process, expedited by circumstances, allows the Supreme Court to benefit from the thinking of the various courts of appeals on the issues presented. For example, with regard to the pre-trial detention statute, we know of no instance where a motion to expedite arguments dealing with the constitutionality of the statute was denied. Instead, courts of appeals recognized the need for an expeditious review of constitutional challenges to the statute, and the Supreme Court similarly acted in a relatively expeditious fashion.

Finally, expedited review may not accomplish the goal of facilitating application of the sentencing laws by resolving the constitutional questions that arise early in the implementation of the new scheme. There may be a host of arguments advanced in challenging the scheme that do not arise in the same case or even at the same time. Piecemeal review by the Supreme Court would result, unresolved questions would be likely to remain, and the potential need to resentence defendants would be present despite the expedited review process.

b. Would it be possible to draft an expedited review provision to narrow the grounds on which a direct appeal could be taken?

The expedited review provision in H.R. 3307 provided extremely broad grounds for appeal. It authorized appeal on the basis that the law creating the United States Sentencing Commission and authorizing the promulgation of sentencing guidelines or any guideline so promulgated violated the Constitution. Thus, any individual guideline that raised equal protection issues, for example, would have been subject to the bill's expedited review procedure.

An expedited review provision can be drawn narrowly to authorize review only where the entire sentencing scheme under the Sentencing Reform Act is called into question. However, for the reasons set forth in answer to the first question, even such a narrow expedited review provision would be inappropriate in our view.

2. Plea Bargaining

a. Can you summarize the Department's instructions to United States Attorneys on plea bargaining under the sentencing guidelines?

In a recently issued publication, the Prosecutors Handbook on Sentencing Guidelines, the Criminal Division provided instructions concerning plea agreements. Enclosed is a copy of the handbook, which addresses plea agreements in chapter IV. The major point of this discussion is that sentences which result from plea negotiations should not undermine the purposes of the Sentencing Reform Act.

The handbook distinguishes between charge bargaining under Rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure and sentence bargaining under Rule 11(e)(1)(B) and (C). According to the handbook, if the agreement is to move for the dismissal of charges or counts under Rule 11(e)(1)(A) or not to pursue potential charges or counts, the guideline sentence applicable to the charges remaining should not undermine the statutory purposes of sentencing. In addition, the remaining charges must adequately reflect the seriousness of the actual offense behavior. The instructions contained in the handbook with regard to charge bargaining are consistent with the Sentencing Commission's policy statement on the subject in section 6B1.2(a) of the Sentencing Guidelines and Policy Statements.

The handbook treats sentence bargains under Rule 11(e)(1)(B) and (C) as follows. If the agreement is to make a non-binding recommendation for a particular sentence or not to oppose the defendant's request for a particular sentence, or if the agreement itself specifies a sentence, the agreement should conform to the sentencing guidelines, except to the extent that departure is warranted under 18 U.S.C. §3553(b) and except to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. The handbook also states that reductions for acceptance of responsibility and use of the low end of the applicable sentencing range, where appropriate, may be included in such recommendations or agreements. The handbook essentially instructs that sentences resulting from sentence bargains should be treated in much the same manner as sentences resulting from conviction at trial, subject to the normal departure standard and recommendations for sentences at the low end of the applicable range.

b. In a case where the prosecutor and the defense attorney agree that three years would be an appropriate sentence, but the applicable guideline provides for at least a six-year sentence, how will the government present the plea to the court? Will the prosecutor present a version of the facts that would bring the sentence down to three years, or will he ask the court to depart from the guidelines?

This question addresses the use of sentence bargaining as distinguished from charge bargaining. If a three-year sentence is not consistent with the guidelines, subject to proper reductions and departures otherwise consistent with the Sentencing Reform Act, the prosecutor should not agree to a three-year sentence or a non-binding recommendation for such a sentence. Similarly, the prosecutor should not present misleading facts to the court.

As indicated in the response to the previous question, the Prosecutors Handbook instructs that an agreement for a particular sentence or a non-binding recommendation for a particular sentence should conform to the guidelines, subject to the normal departure standard and reduction of a sentence to reflect a defendant's assistance in the investigation or prosecution of another person. In addition, a sentence bargain may take into account the two-level reduction provided by section 3E1.1 of the guidelines for acceptance of responsibility and may further provide for a sentence at the low end of the applicable sentencing range. Use of this two-level reduction and sentencing at the low end of the applicable range can mean a roughly 35% decrease in a prison term at the higher offense levels and an even greater decrease at the lower levels. If departure from the guidelines is warranted under 18 U.S.C. §3553(b) because a mitigating circumstance exists that was not adequately taken into account by the Commission or is justified by 28 U.S.C. §994(n) or 18 U.S.C. §3553(e) to reflect a defendant's substantial assistance in the investigation or prosecution of another person, an even greater reduction is possible. Thus, there is room for substantial bargaining within the guidelines and the applicable law on departure. However, in the example provided, a prosecutor should not agree that a three-year sentence is appropriate under the guidelines if a minimum of six years is provided by the guidelines _after_ the allowable reductions are calculated unless a departure would be warranted under the standards set forth in the Sentencing Reform Act.

The handbook specifically instructs prosecutors not to enter into a stipulation that contains misleading facts, page 48. The handbook also states, "if the defendant can clearly be proved to have used a weapon or committed an assault in the course of the offense, the prosecutor may not stipulate, as part of a plea agreement designed to produce a lower sentence, that no weapon was used or assault committed." _Prosecutors Handbook_ at 48-49. This instruction is consistent with the Commission's policy statement on fact stipulations, section 6B1.4. The handbook also provides that prosecutors may not instruct investigators not to pursue leads or to make less than ordinary efforts to ascertain facts in order to be able to say that such facts cannot clearly be proven, page 49. The policy behind this strict approach is also set forth -- namely, to foster the purpose of the Sentencing Reform Act of reducing unwarranted sentence disparity. However, a prosecutor may stipulate that a particular factor is not present in a case if its existence is not clear. Thus, the prosecutor is prohibited from presenting an untruthful version of the facts for plea bargaining purposes.

c. If the prosecutor asks the court to depart from the guidelines for purposes of a plea bargain, what would the ground for departure be? Would there be a ground for departure, or would the government merely be assuming that no one would appeal a sentence outside of the guidelines in that instance?

Prosecutors have been instructed that in entering into a sentence bargain the only grounds for departure from the guidelines are those that would be justified in the absence of a plea agreement. Such departures must be consistent with: (1) 18 U.S.C. §3553(b), that an aggravating or mitigating circumstance exists that was not adequately taken into account by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described; or (2) 28 U.S.C. §994(n) and 18 U.S.C. §3553(e), to reflect a defendant's substantial assistance in the investigation or prosecution of another person. Prosecutors Handbook at 43-44. As indicated in the handbook, we do not believe that an independent ground for departure exists merely on the basis that the sentence arises out of a plea agreement.

I would be pleased to respond to any further questions members of the Committee may have.

Sincerely,

Bill Weld

William F. Weld
Assistant Attorney General

Enclosure

Senator KENNEDY. Well, thank you. Thank you very much.

Let me ask you about the issue of constitutionality which was raised just in a passing way earlier in the course of the hearing.

Has the Justice Department had an opportunity to review it?

Mr. WELD. The Justice Department has opined on the issue, Mr. Chairman, an opinion from the Office of Legal Counsel, dated January 8, 1987, which I would be happy to submit for the record.

The bottom line is that the alleged problem with the composition of the Commission, because of the manner of appointment of its members, does not violate the separation of powers, because the conclusion of the Office of Legal Counsel is that the Sentencing Commission is acting within the Executive Branch in discharging its functions. But I think probably the best thing for me to do is to submit the opinion.

Senator KENNEDY. Your testimony is that all the employees at the Department of Justice will be trained, acquainted, familiar enough to deal with the Guidelines at the appointed time, and your testimony is that they will be set to go?

Mr. WELD. Yes, Mr. Chairman.

Senator KENNEDY. And you've been satisfied with the training sessions and the involvement of the judges in those training sessions?

Mr. WELD. Yes, Mr. Chairman. We plan to make use of the videotapes developed by Judge Mazzone and his group.

I don't mean to imply that all the training sessions have already taken place. Some will take place in November and some even in December, but we think it will be adequate to the task.

Senator KENNEDY. And that the flow line of cases will not put an undue burden on the judges themselves?

Mr. WELD. I really do not believe so, Mr. Chairman.

I was out in the field as an U.S. Attorney when the 1984 legislation went into effect, the pretrial detention provisions. Any my best judgment is that in terms of altering the procedures in the District Courts, the pretrial detention, the bail reform aspects of the 1984 statute made a greater change than the Sentencing Guidelines will make.

And we adjusted to that change even though, as you know, that bill passed somewhat unexpectedly at the last minute. So I think that this change will be able to be absorbed just as they were.

Senator KENNEDY. Well, we appreciate the opportunity to work with the Department. That's been an ongoing and continuing process through different Administrations. And we have valued it very much, the members of this Committee. And we thank you very much for your appearance here.

Mr. WELD. Thank you, Mr. Chairman.

Senator KENNEDY. And there are other members who have questions. We will submit those to you.

Thank you very much.

We'll just take about a two-minute recess.

[Short recess.]

Senator KENNEDY. We'll come to order.

We are pleased to welcome next three distinguished judges appearing today on behalf of the Judicial Conference. The Judicial Conferences represents the National Federal Judges, and also plays an advisory role to the Sentencing Commission under the Sentencing Reform Act.

Testifying for the Conference are Judge Becker of the Third Circuit, Judge David Mazzone of the District of Massachusetts, and Judge Gerald Tjoflat of the 11th Circuit.

Judges Mazzone and Tjoflat are members of the Judicial Conference's Ad Hoc Committee on the Sentencing Guidelines. Judge Becker is a member and Judge Tjoflat the Chairman of the Conference Probation Committee. Lastly, Judge Mazzone chairs and Judge Tjoflat is a member of the Federal Judicial Center's Education Committee which has been developing training programs on the guidelines.

We want to welcome all and extend a special welcome to our good friend from Massachusetts who has served the Federal Court there with such distinction and has been a long-time friend.

JUDICIAL CONFERENCE PANEL CONSISTING OF HON. EDWARD R. BECKER, JUDGE, THIRD CIRCUIT, PHILADELPHIA, PA; HON. GERALD TJOFLAT, JUDGE, ELEVENTH CIRCUIT, JACKSONVILLE, FL; AND HON. A. DAVID MAZZONE, JUDGE, FEDERAL DISTRICT COURT, MA

Judge **Becker**. I am Judge Becker, and I will lead off, Senator Kennedy. Judge Tjoflat is to my right, Judge Mazzone, whom you know, is to my left, and to Judge Mazzone's left is Christy Massie, who is an attorney with the Office of Legislative Affairs, the Administrative Office of the United States Courts.

I have a prepared statement which I have entered into the record.

I speak this morning as a representative of the Judicial Conference of the United States. I will make no substantive comment upon the Sentencing guidelines. We view them as a legislative fact. We believe it is our solemn duty to make them work.

However, contrary to some representations that have been made here this morning, these guidelines represent no small change. They represent the most significant change in the criminal justice system since the founding of the Republic.

It is the position of the Judicial Conference of the United States that we urgently need a delay of at least three months in the implementation of the guidelines. I respect the incandescent brilliance of Judge Breyer who says he can teach them in two hours. I was in Traverse City, Michigan, last week on an all morning session with the Judges of the Sixth Circuit on the guidelines. The morning, according to the view of those Judges, was not enough.

Now, the Conference position has evolved essentially as follows: in September 1986, the Judicial Conference requested a six-month delay. In May of 1987, when the guidelines were finally available, we went to work on training. We found a lot of bugs in the system. The Sentencing Commission, too, has found a lot of bugs in the system because it has recently rewritten the commentary, and 10 days before the guidelines were due to go into effect, we have yet to receive that commentary. That's very important in terms of implementation of the guidelines.

September 21, 1987, seeing these problems, the Conference requested a 12-month delay in implementation. The Conference still believes that 12 months would be desirable, but we are realists. We have heard the declarations such as those that have been made by the Senators this morning. We understand we can't get 12 months, we understand we can't get six months.

We urgently request the Congress to give us a three-month delay. We think that it is the minimum we need to make these guidelines work, to make it meaningful sentencing reform. Our motive is not to kill the guidelines. There's no danger of any dependent getting off easily. We do not oppose the guidelines as such. We want three months——

Senator KENNEDY. Does your position take into consideration the fact that they wouldn't go into effect until the November 1st date in any event?

Judge BECKER. Beg pardon?

Senator KENNEDY. This position you assume takes into consideration that the guidelines would not go into effect until November 1st?

Judge BECKER. We understand. We understand that.

But, Senator Kennedy, let me change the scene from Washington to San Diego, California.

According to the report of the Federal Defender of San Diego, during the first six months of fiscal year 1987, that office opened 2,737 cases, most of which involved defendants who appeared, pled and were sentenced on the same day. Now, most of them were petty offenses or misdemeanors involving drugs, possession of false documents and illegal entry, but the guidelines will nonetheless apply.

Now, that means 10 days from now, or two weeks from now in San Diego, California, there will be a flood of cases that will be sentenced under the guidelines.

You heard Mr. Weld say, and it confirms my own investigation in the U.S. Attorney's Offices, in my circuit, that the U.S. Attorneys' training packages have yet to arrive. These guidelines, Senator Kennedy, are not just administered by judges. They're administered by lawyers. We've heard it said that most of the cases are disposed of by plea bargains. True.

You can't engage in a plea bargain unless you know and understand the guidelines. The U.S. Attorneys haven't had any training. The defense bar hasn't had any training, and the job of training judges is a very significant one. The fact of the business is that we have 700 judges to train, 300 U.S. Magistrates, and over 2,000 Probation Officer, many of them in a rural setting.

But let me get back to San Diego for just a minute.

Senator KENNEDY. Let me ask you, if you took the petty offenses out of the guidelines, because this is what you were mentioning here with regard to San Diego, say you took those out of the guidelines, would that provide significant relief?

Judge BECKER. The answer is not immediately because, unless you do that within the next 10 days, we've got the same problem. And amending the law will take you time to do.

My concern, Senator Kennedy, is in the period commencing 10 days from now. Ultimately, a petty offense amendment will give some relief, and that may be desirable. I take no position on that. But the question is can you get that done in 10 days? I think in 10 days you could probably get a 90-day extension for implementation purposes. But the fact of the matter is that in November, December and January, these offenses will have to be dealt with under the guidelines.

A typical case will be somebody brings aliens from across the border. Perhaps they do it for pay. The border agents seize them, and when they seize them, they also find some marijuana and they find some cocaine, and then what you do is you get a Federal Judge who, in the absence of the guidelines, would look at the total picture—and he's seen hundreds of these cases—and he looks at the background and he comes up with a sentence. He's not going to be able to do that on November 1st. He's going to have to go through a guideline calculation.

I have here a worksheet that the Sentencing Commission has prepared. He's got to go through the offense level, calculate victim related adjustments, role in the offense adjustments, obstruction adjustments, come up with an adjusted offense level. And then, on the basis of his criminal record, there's a rather complicated—it may look easy with a guideline sheet—but there are a number of complicated legal questions that are involved in connection with each of these calculations. The criminal history is not simple calculate offense level.

The multiple offense guideline, which works on a curve, has a very elaborate formula that is necessary to calculate the multiple offense adjustments. Well, I don't want to go on and on and go through all of this. But the fact of the matter is that these guidelines are not simple, they are very complex. It is the judgment of the Federal Judiciary that they are complex, and that the training effort is a significant one.

Now, we have not been doing nothing. We have prepared, and I would be very pleased if the Committee would receive, first this Presentence Investigation Report Monograph. This is a Herculean job which has been done by the Probation Division, the Administrative Office, led by the Committee of which Judge Tjoflat is the Chairman. The sentencing hearing is totally different under the Sentencing guidelines. I also hand up a whole set of procedures for the District Courts and a sentencing appeal information statement to help monitor the appeals that have also been prepared. I would ask the committee to receive those.

We have also developed a large packet of instructional materials. We have developed a series of "train the trainer" seminars. The thesis, Senator Kennedy and Senator Specter, who just arrived, is that we will train Probation Officers and judges in each district. We had one last week in Washington, 44 Probation Officers, 18 District Judges. This week in Dallas we had 43 Probation Officer and 16 judges and so forth. The Probation Officers not only have to be trained in calculation of the guidelines, but also in the new procedures.

We have a cadre of Probation Officers who came to the job as social workers. Now, under the guidelines they will have to become fact finders and mediators in order to assist the sentencing process.

So we're working very, very hard to get everybody trained. And by the end of this week, 138 Probation Officers in seminars and 350 or 400 others whom we have trained in-house will have sufficient experience to calculate guidelines and train others. But that means there are 1,500 to go. Not all the judges could get to Traverse City, Michigan, for the seminar that I conducted last week. Because of Speedy Trial Act constraints imposed by the Congress, they were in their districts. They were trying cases. Can the judiciary be criticized for not training before? The fact of the matter is that the Sentencing Commission's commentary has just been revised. And had we trained earlier, a lot of that effort would have been wasted. The judges were busy doing other things. And as I have pointed out, the Justice Department, to this day, does not have the training packages in the hands of their Assistant United States Attorneys around the country.

And if you have a situation, like I have described in San Diego, which is very, very real, within a week or so we are going to have lawyers who don't understand the guidelines in cases which District Judges have to sentence that day. Therefore, this lag time which has been talked about is simply illusory.

We have computers on order. The Sentencing Commission has prepared a computer program. Ninety-five computers in each of the districts in order to help calculate guidelines. They haven't arrived yet. With the three-month period, we will be able to do that job. And we will be able to not only train the Probation Officers and the judges, but also the United States Attorneys. As I said, the Bar has to understand these or else they cannot sensibly and intelligently enter into plea bargains. And within that three-month period, we will, I think, be able to solve that problem.

We are simply not ready for November 1st, and we've still got some adjustment and fine tuning to do when we get the revised commentary from the Sentencing commission which, to this day, we have not received.

The fact of the matter, Senator Kennedy and Senator Specter, is that this is not a situation for on-the-job training.

Mr. Weld, representing the Justice Department, said the only way we're going to do it, is you go in and you don't sink, you swim.

The fact of the matter is that very important rights are involved here. We are dealing with individuals, we are dealing with human beings. And if we have lawyers who don't understand these guidelines, and if we have judges who don't understand these guidelines, there are going to be mistakes. Any level of error is unacceptable.

The defendant, who gets six months or a year more in jail, because haste makes waste, or the prosecutor who finds that the sentence is too low because we weren't ready for these things, is going to have a very legitimate gripe.

The standard of the Federal Judiciary is the very highest standard of excellence, and it is something we should not compromise in our effort to get these things going without any delay.

Now, secondly, the matter of prison impact is something that I think that the Committee and Congress should very seriously consider.

There has been much talk about the impact in terms of long-term sentences. You heard this morning—and I think it was the

Justice Department—perhaps it was Commissioner Block who said, that the most significant impact is going to be on short-term sentences, and so it is.

My own calculation—I have done this as best I can—is that there are going to be roughly 5,000 cases a year, that formerly went on probation, that are now going to be the subject of short-term prison sentences.

Well, where are these facilities? You heard Senator Simpson comment about problems in the local community. The Bureau of Prisons has got to contract for these facilities. If a white-collar offender is going to go to a halfway house, is going to go to a community treatment center, it has got to be there.

My own very strong perception—I have had a lot of experience in this field—is that the Bureau of Prisons does not, as we speak, and will not, in the next ten days, or two weeks, have the facilities for us to send these people who will be serving short-term sentences.

Now I tried to get an official position out of the Bureau of Prisons, and the best I can get from the director of the Federal Bureau of Prisons is that "it sure would help,"—"it would be nice if they could get it." Obviously, the Bureau of Prisons is not going to give an official statement to me, but my own strong sense is that they are not ready and that they need time.

Additionally, if there is a three-month delay in implementation, these other very critical problems, in terms of the effective working of the guidelines can be worked out by the Congress. The *ex post facto* amendment is important.

We need a bill which provides for expedited Supreme Court review. I am not going to comment on the constitutional problems except to identify them for arguably, they may come before me, but people have raised some very serious problems about the scope of the delegation, about the appointment by the President of this commission. You heard Mr. Weld say that the Justice Department says that it is in the Executive Branch. Well, the statute which was passed by Congress says it is in the Judicial Branch, but the members can be removed by the President. That is the Synar, that is the Gramm-Rudman problem. These problems have to be litigated, and, unless the Congress provides for expedited review, i.e., an immediate appeal to the Supreme Court from the district courts, or, as the House bill said, from a three-judge D.C. District Court, we are going to have a great deal of uncertainty if the Supreme Court invalidates the guidelines. It can take a long time, if you have to go through all of the courts of appeal.

That is another important provision. The standards for departure, I endorse that, I think, as well. There are a number of other salutary legislation provisions that the Congress will have time to enact if we have this three-month delay.

In sum, Senators, we have been working very, very hard, but the task is enormous, the change is revolutionary, the stakes are very high, and we do not want to do a shoddy job. We are not trying to kill these guidelines. We just want to do the job right. Judges are busy doing other things.

We have prepared the training materials, but these things are very complex. At the seminar I attended in Traverse City, there were a million and one legal questions that the judges raised, and we have got to explore them.

That is why we need at least three months, and we urgently ask the Congress to give it to us. Thank you.

[The statement of Judge Becker follows:]

PREPARED STATEMENT

OF

HONORABLE EDWARD R. BECKER
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AND

HONORABLE A. DAVID MAZZONE
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON
SENTENCING GUIDELINES

THURSDAY
OCTOBER 22, 1987

Mr. Chairman and members of the Committee, it is a pleasure for me to appear before you today on behalf of the Judicial Conference of the United States. My purpose is to present the views of the Conference as to the urgent need for a delay of at least ninety days in the implementation of the sentencing guidelines and to rebut the arguments that have been made in recent days in opposition to delay in implementing the guidelines. My purpose is not to suggest repeal of the guidelines or even to comment on their merit.

The Judicial Conference first addressed the question of the effective date of the guidelines at its September, 1986 meeting. That meeting, I should note, was three drafts of the guidelines ago. The Conference was concerned then, as it is now, with the lack of lead-time in which to train 700 judges, 500 magistrates, and over 2,000 probation officers. The guidelines are, by law, effective immediately after the Congressional review period is over. Thus, it appeared at that time that Congress could and might alter the guidelines up to the hour that the Judiciary must implement them with real cases and real lives. That possibility remained, I think, until just two weeks ago.

In light of this concern, the Conference in September of 1986 unanimously supported a six-month extension of the date for implementation. When guidelines were finally available, in May of this year, our training people went to work to develop a comprehensive training program. That work revealed a number of "bugs" in the system. That, of course, is inevitable in such a vast and difficult task. The Commission itself apparently had a similar experience. We have been told that it has rewritten the commentary that explains and supports the guidelines, to resolve what one Commissioner has described as over 500 problems. As of today the judges have not received this new document. This failure is crucial. According to the Commission's statements, commentary may well have the force of law. At all events revisions in the commentary will require revisions on our training program.

These "bugs" and the magnitude of the task ahead led the Conference, at its meeting on September 21, 1987, just four weeks ago, to alter its recommendation for delay by extending the delay from six to twelve months. Again the action was unanimous. By this time, though, the Conference was joined in calling for delay by the American Bar Association which requested a two-year delay, Senator Dixon who supported an 18-month delay, the National Association of Criminal Defense Lawyers which requested an 18 month delay, Congressman Conyers who supported a 9-month delay, and the Sentencing Commission itself which had requested a 9-month delay.

The Conference was also concerned with ambiquity of the law as to which defendants would come under the guidelines, and urged Congressional clarification on this question.

All of us are aware of the actions in the House earlier this month when it defeated the Conyers, nine month extension proposal, which had been offered with broad bipartisan support. A number of questions can be raised concerning the arguments used to defeat that proposal.

First, it has been argued that delay was the first step in an effort by judges to kill the guidelines. Let me point out that two then-Federal judges, Harold Tyler and Marvin Frankel, fathered the guidelines effort. Three Federal judges sat on the Sentencing Commission and voted for the guidelines. While undoubtedly there are Federal judges who would like to repeal the guidelines, let me stress that the Judicial Conference does not take and never has taken such a position. Our concern is that we be given adequate time to prepare the most revolutionary systemic change in the Federal criminal justice system since the forming of the Republic.

Second, it has been argued that the courts and probation officers will be able to fully implement the guidelines on November 1. This argument was supported by a letter from a member of the staff at the Commission without consultation with the individuals who are designing and implementing the training. The professional staff at the Federal Judicial Center who are actually doing the job believe that they can and will put on the best possible program given the time constraints, but that an extended training period would be invaluable.

Third, the argument has been made that the one-year delay from November 1, 1986 to November 1, 1987 was promoted by the "opponents of reform" who should not now be given another delay. The statement is a fabrication. That delay in submitting the guidelines was sought by the Commission itself in consultation with the Department of Justice. The reason for the delay was that the Executive Branch had failed to arrange for appointment of the Commissioners until only six months remained before guidelines were to be submitted.

Fourth, it was argued that there is a built-in lag time caused by the applicaton of the new system only to offenses committed after November 1, 1987, and by normal delay in sentencing. As to this latter point, the theory is that the natural delay between conviction after November 1 and sentencing can be used for training. That argument is invalid. Much of the lag would be used to prepare a pre-sentence investigation — an activity requiring application of the guidelines. Moreover, the delay in many cases is quite minimal — a few days. In the Southern District of California, for example, it is reported that a third of all defendants indicted are sentenced the same day! In addition, court and probation personnel must continue to handle criminal cases under the old system and will not be able to spend substantial amounts of time initially to concentrate on the new guidelines system.

Fifth, it was argued that thousands of prisoners would receive substantially lesser sentences if a delay was approved. The figures cited showed a doubling or quadrupling of current sentences. These numbers are inconsistent with the Commission's advertised numbers. The differences represent billions of dollars in appropriations. Resolving these differences might be a suitable subject of Congressional oversight.

In short, the Conference believes that the arguments in opposition to a delay are insubstantial. And we believe that there are many strong arguments in favor of a delay.

Our training effort has begun. It was scheduled to begin in September but was delayed at the request of the Commission. In the ten days that we have left we will do our best to train all judicial personnel. However, we can expect significant uncertainty and a high error rate. These errors will affect the lives of victims and defendants. No good for sentencing reform will come out of a chaotic implementation.

Moreover, it is not just our training that matters. As of late last week, a check with major United States Attorneys' offices disclosed that they had not even received training materials yet. Defense counsel are in worse shape. Many, if not most, of them have not even received the a May guidelines or commentary yet, probably none have the latest draft. Unless attorneys are trained in the guidelines they cannot be effectively implemented.

We are concerned, also, with funds for transcripts of sentencing hearings, preparation of local rules and impact on appellate courts, but our primary concern is with training.

While the Conference believes that a full 12 months is needed to adequately test and implement the guidelines, its Executive Committee, recognizing the political realities at this late date, has directed that we seek a delay of at least three months. Such a figure presents no danger of killing the guidelines or of letting thousands of defendants off "easy". It represents an absolute minimum period needed to do what we all want — to give these guidelines the best possible chance of becoming a milestone in sentencing reform.

I would be remiss if I did not take this occasion to urge you to act on another Judicial Conference position. The Conference last spring sent over legislation which would create 56 new district courts and 13 new appellate court judgeships. Those figures were based on 1984 data, now obviously outdated. Also, of course, that data includes no projections with regard to sentencing guidelines. If these guidelines are to be adequately implemented we need time and we need resources. I urge you to provide both. I also urge you to resolve the ex post facto issue, which is most urgently in need of resolution. I will be happy to answer any questions you may have.

Attachment

1987 ACTIONS OF THE JUDICIAL CONFERENCE CONCERNING SENTENCING GUIDELINES

July 8, 1987 — The Executive Committee of the Judicial Conference unanimously supports a nine-month delay in implementation of the guidelines in order to provide time for training and for securing resources.

September 21, 1987 — The Judicial Conference unanimously approves the position of the Executive Committee.

October 14, 1987 — The Executive Committee conferred and reiterated the Conference's strong position that a twelve-month delay was needed. It seeks an extension for as long a time as possible up to twelve months; however, it stated that in no event should an extension be for less than three months.

SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS FOR JUDGE BECKER

1.. I would like to ask you several questions about your suggestion that Congress provide a mechanism for expedited appellate review of constitutional challenges to the sentencing guidelines.

a. Isn't it likely that the courts, being well aware of the importance of this issue, will shorten briefing schedules and otherwise act to expedite the appellate process without Congress' having to enact a statute to deal with the problem?

b. Can't the Supreme Court, as it did in United States v. Nixon, reach down and take a case on direct appeal if it wants to do so?

c. Isn't it true that the Supreme Court actually opposes statutes that give parties a right of direct appeal on the ground that the court benefits from allowing the issues to be sorted out as the cases percolate through the lower courts?

2. Unlike the situation with the Gramm-Rudman-Hollings bill, which included a direct appeal provision, there is no single constitutional issue that is certain to be raised against the sentencing guidelines. Indeed there are any number of constitutional challenges that might be raised, and their will be any number of criminal defendants ready to raise them.

a. How would a statute providing for expedited appellate review be drafted to avoid a situation where many cases, each raising a slightly different constitutional issue, all were taken to the Supreme Court on direct appeal?

United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

November 10, 1987

Senator Joseph R. Biden, Jr.
United States Senate
Chairman, Committee on the Judiciary
Washington, DC 20510-6275

Re: United States Sentencing Commission Guidelines - Expedited Appellate Review

Dear Senator Biden:

I am pleased to respond to the questions submitted to me concerning my suggestion, in testimony before the Senate Judiciary Committee on October 22, 1987, that Congress provide a mechanism for expedited appellate review of constitutional challenges to the sentencing guidelines.[1] For ease of reference I repeat each question and follow it with my response.

> 1a. Isn't it likely that the courts, being well aware of the importance of this issue, will shorten briefing schedules and otherwise act to expedite the appellate process without Congress' having to enact a statute to deal with the problems?
>
> Yes. However, eliminating the Court of Appeals stage will-accelerate final resolution of the question by many months. This savings is important because, in the event that the guidelines are declared unconstitutional, the delay occasioned by intermediate appellate review would mean that many more people than necessary will have to be resentenced.
>
> 1b. Can't the Supreme court, as it did in United States v. Nixon [418 U.S. 683 (1974)] reach down and take a case on direct appeal if it wants to do so?

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1. Although I testified before the Committee as the representative of the Judicial Conference of the United States, my comments about expedited appellate review were not offered in that capacity.

Yes. However the Supreme Court had done this only a few times in its history.

1c. Isn't it true that the Supreme Court actually opposes statutes that give parties a right of direct appeal on the ground that the court benefits from allowing the issues to be sorted out as the cases percolate through the lower courts?

I am unaware of an official Supreme Court view on the subject. I have no doubt that the Court would frown upon a proliferation of such statutes but, given the critical societal importance of avoiding unlawful sentences, I believe that it would be hospitable in this instance. There will doubtless be numerous appeals from the various district courts raising a variety of constitutional challenges, thus supplying the necessary percolation, and the Court could pick and choose from among the cases those that best represent the spectrum of constitutional issues (or those that best present them).

2a. How would a statute providing for expedited appellate review be drafted to avoid a situation where many cases, each raising a slightly different constitutional issue. all were taken to the Supreme Court on direct appeal?

I know of no way that it can. However, the Supreme Court can simply let the cases stack up and remand them after it decides the issue. It would be desirable to put a time limit on the bill -- i.e., providing for direct expedited appellate review only for a short period -- e.g., until June 1, 1988.

Sincerely,

Edward R. Becker

ERB:pmk

Senator KENNEDY. Thank you very much, Judge, for your very impassioned and obviously well-studied comment on this.

Let me, if we could, hear from your colleagues, just about what has been going on today in terms of the training program for the judges. I think it would be useful in terms of our evaluation of the nature of how these recommendations will be implemented, if we knew what has been happening to date in terms of training programs.

Judge MAZZONE. Yes. Thank you, Senator Kennedy. I did also submit a prepared statement.

Senator KENNEDY. All the prepared statements will be included in the record.

Judge MAZZONE. I just wanted the record to show, that while I am a representative of the Judicial Conference, and therefore support the statement made by my colleague, Judge Becker, I am here also in another capacity, and that is as chairman of the Training Committee, and it is to that I expect you want me to address my comments.

The first thing I should say is that the Committee is composed of myself as the chairman, Judge Becker, Judge Tjoflat, Judge Butzner from the Fourth Circuit, and Judge Orrick from California.

And the Committee has worked closely throughout its tenure with the administrative office, that is, the probation division of the administrative office, and of course with the Sentencing Commission and its staff.

Now, we began about a year ago, and, again, I want the record to show that I am consistent, at least, in saying today what I said before the House Judiciary Committee, and that is that we have always geared our training effort to be ready to implement guidelines on November the 1st, because that is what we were told to do.

If we had more time we would use it, and we would do a better job, but we are ready as of November 1st, because beginning early in the spring, just about May, we began to put on special programs for the Judiciary and other affected members.

To every scheduled conference, or seminar, or workshop, we added on a program. Maybe it was only an hour or two, but it was a program to inform the participants of what was going to happen, and what the outlines of the guidelines were.

Since then, over the period of time, there have been prepared and disseminated specific manuals to alert probation offices, principally, about those special skills, and those special jobs that they were going to have to do.

So, over the course of the summer, two or three of those manuals, videotapes, pamphlets, have been prepared and disseminated, principally to probation officers. The Federal Judicial Center has prepared, or has contracted to prepare a computer program. It will be available to every district.

It is merely a computer checklist, but at least it will minimize the opportunity for error by guiding the user through the series of steps which will have to be taken in order to reach the correct guideline.

As we speak there is now going on a so-called "train-the trainers seminar," that as Judge Becker has said, and others have said, has taken place in Washington the week of the 12th, this week in Dallas, next week in Boulder, Colorado.

At those seminars, there is a designated probation officer, and perhaps two from every district in the country that will be represented, and we invited the districts to send a judge to them, and as I have heard this morning, about 50 percent of the districts have done so.

Those "train-the-trainers seminars" have received this packet of material. This is the heart of the training effort, Senator Kennedy.

Here are three videotapes, and a binder entitled "Guideline Sentencing Orientation." It is in finished form, ready for distribution.

Copies of it have been ordered by the Justice Department and this will be sent to every district in the country.

It is composed of these three videotapes. The first videotape is a outline of the features of the Sentencing Reform Act and the guidelines. The second is an application of the guidelines, and the third are the procedures for guideline sentencing.

The purpose, of course, of the videotapes is to make the instruction uniform because these are the areas in which every judge must do the same thing. The binder contains outlines of these videotapes, discussion questions, exercises for practice in applying the guidelines, worksheets, and completed worksheets for the exercise with extensive annotations which explain it.

In the "train-the-trainer seminars" there have been, as I say, these probation officers who have been trained. At the end of that seminar, every district is asked to set a schedule for when they want this material, and when they are going to schedule that training.

To date, 24 districts have sent in their training plans, and in those districts, in-court training is scheduled for late October and early November, and most of those courts will have completed their training by November the 15th.

The 24 courts that have so far scheduled training account for a total of 905 persons out of a total of about 3000 people that we think are going to have to be trained.

Arrangements have been made, invitations have been sent in some districts to members of the private bar. I know in Massachusetts they have. I know in Miami they have. The United States Attorney's Office in Massachusetts has asked to be included in our training program and they will be.

I have received communications from members of the private bar to be included and they will be included. In short, I think as Judge Becker has said, the Federal Judicial Center has worked very hard, its staff has worked very hard, and they have put together this package, and while, as I said before, a delay would be welcome because we could do it better. If we were to proceed on November the 1st, we are ready.

I think principally, I might add, that one of the reasons that we are ready is because we have the two important things about teaching any subject, Senator, and that is, we have an interesting subject matter. We have a subject matter here of guidelines which are rational and proportional, and which are flexible, allow for departure.

They are comparable to what we have been doing all along, but in a more structured form, I submit, and they are evolutionary. There is continuing education going on.

There is even an appeal safety net. So it is something that we can teach, because it is an interesting subject matter. And then we have, of course, the most intelligent student body that we can possibly assemble.

We have 750 men and women of the Federal Judiciary, and dedicated probation officers, and the like, and they will do what the Congress has indicated that they should do.

So I will be happy to respond to any questions. One thing I also might say is, we have always geared our program to November 1st because except for the situation in Southern California, we have relied upon the figures of the Sentencing Commissioner, and Commissioner Block, in particular, that in the first three months of sentence guideline application, there will be in November, about 63 cases that will come up for sentencing under the guidelines, in December, 316, and in January, 616.

That does not account, of course, for the situations in Arizona and in Southern California, where they face these, either petty offenses, or offenses that quickly turn over, such as alien offenses.

I would be happy to respond to any other questions.

Senator KENNEDY. Thank you. Judge Tjoflat, could you tell us a little bit about your program on the probation office.

Judge TJOFLAT. Well, Senator, I am here wearing several hats. I have been chairman of the Committee on the Administration of the Probation System which was given the responsibility of monitoring the legislative development of this law back in 1971 or 1972. I have been the one responsible for the monitoring and have testified before this committee every time you had hearings, and, before the House Judiciary Committee when it considered this bill, and the House counterpart.

And I also serve with Judge Mazzone on the Training Committee, as he mentioned, and with Judge Becker, and with Judge Mazzone on the Ad Hoc Committee.

I do not want to repeat what these two great judges have said about this, the effort on behalf of the Judicial Branch to implement the law, but I will come at it from a little different perspective.

We knew—and when I say we, on the Probation Committee, which was most closely connected with this law when it was passed in 1984—and more importantly, as we met with the Sentencing Commission, as they struggled through the early stages of the methodology about how they were going to write the guidelines—and let me pause here and say that the Commission, in my judgment, did a magnificent job in their attempt to carry out the Congressional mandate. Magnificent to the extent that they went the last mile, and I think the methodology that they employed, and the research they did—as Judge Breyer articulated—in promulgating these guidelines, was true to the spirit and the letter of the law.

Now, we knew that there were going to be problems implementing this law to make the sentencing process efficient, to make the appellate process efficient.

We drew some amendments to Rule 32 of the criminal rules, which is the sentencing rule, and sent them to the Advisory Committee on criminal rules over a year ago.

The Advisory Committee met last May. I met with them. They in effect said that we cannot, through the rulemaking process, because of the delay, come up with some amendments to the sentencing rule to permit a more efficient sentencing process.

So we drew a model local rule and some recommended procedures for guideline sentencing which I sent to all United States Circuit Chief Judges and District Chief Judges on August 28th.

Judge Becker has brought that letter and the document, and referred to it in his testimony. We did that in order to establish a procedural mechanism for efficient sentencing in the district courts.

At the same time, realizing that the job of the probation officer and everyone involved in the sentencing process was going to be entirely different under this new law, compared with the old law, as it were, we redrafted the manual for use by probation officers in conducting pre-sentence reports, and redrafted the report format, and all that work has been done.

There is nothing more to be done in that regard. This manual has been made available to all probation officers. It is being used in all the training seminars that Judge Mazzone mentioned, and it is being sent to all United States judges.

So that the judges reading the manual, and the model local rule that I sent them last August, with commentary, should have an excellent grasp of how an efficient sentencing hearing ought to be conducted.

Last month, on the Saturday before the meeting of the Judicial Conference of the United States, I met at the Federal Judicial Center with the chief judges of the Circuit Courts of Appeals, in an effort to ferret out the problems that will be entailed in appellate review of sentencing, and to discuss methods that can be used by the courts of appeals without amending the appellate rules, in order to make for efficient review of sentencing.

And in my judgment, the courts of appeals, which will be further down the road in the implementation of the sentencing process, will be able to tackle this job fairly easily. There are going to be some initial appeals, referred to by Judge Becker, that may involve the constitutionality of the statute, and some other legal issues.

Once they are resolved, most of the appeals are going to be on the basis of alleged incorrect findings of fact by District Judges, and misapplication of the guidelines.

So the appeals in these cases are not going to resemble the typical appeal in a criminal or even in a civil case. Now, that having been said, we can always use more time to prepare for something such as the implementation of this law.

We could have used more time when the Victim and Witness Protection Act of 1982 was passed, as to which the Judicial Branch had no advance knowledge, and we swallowed that monster, as some call it, in due course. We have had much more opportunity here to get ready for this law.

We had no notice, either, of the Speedy Trial Act, which, if I recollect, was passed in the waning hours of December 1974, and it was put upon the Judicial Branch the following month, and somehow met the task.

I say this, and I do not mean to minimize the problems that do face the judiciary. What I mean to say is that we have done the very best job we can do to get ready for the implementation of this law.

We have not delayed one whit, and we are ready, whether we have a delay, or whether we do not have a delay. I would like to say a word, or two, about the package of proposed sentencing amendments that is now before the Committee.

Some of these amendments are essential in the long-run, some on the short-run. Mention has been made of the ex post facto problem. My personal view is that is a non-problem. The law ought to be amended to cure it, but it is not a practical problem, for this reason.

First, the Department of Justice is not going to seek to ask any District Judge to sentence somebody who committed a crime prior to November 1 under the new law. So the Government is not going to be urging it.

If any defendant says I do not want to be sentenced under the new law for a crime committed under the old law, I cannot imagine a District Judge who is going to say, well, I am going to do it anyway.

So I do not see any error that is going to be committed in an ex post facto sense. That means that we are going to have a few cases in November and a few more in December, and a few more in January, and as the speedy trial clock runs, and makes cases come to a head, we will have a full onslaught of cases, probably, by February or March.

The amendments relating to the appeal of cases from magistrates to district courts is necessary because, at the present time, the law does not provide for it.

The amendment relating to the departure from the guidelines' language is a necessary amendment, whether it is made now, or later.

One last comment on something contained in the package before you. It has to do with collection of fines. There are over a half billion dollars' worth of unpaid fines that have been imposed by the Federal courts, that have not been collected.

$156 million of the over one-half billion were imposed during the last 11 months, and are uncollected. For years, the Judiciary and the Department of Justice have been having a debate as to relative responsibilities in this area.

For the last six weeks, we have been working with the Department, and we have come to a solution of the problem, and that is included in these sentencing amendments.

On Monday, the House, on the suspension calendar, will pass a bill, I believe, that will incorporate what we have worked out, and we hope that the Senate will pass it by November 1.

Senator KENNEDY. Is that realistic, that you will be able to collect that amount of money?

Judge TJOFLAT. Senator, what has happened is, when a district judge imposes a fine in the real world now, unless it is a condition of probation, which means a probation officer on a monthly basis is going to the defendant, as he supervises the defendant, and says, "Let me have the money"—it is a fine that is simply imposed—what happens is that nobody does anything.

The prosecutors' offices are overloaded. There is a grand jury waiting for another case, and the fine sits there, and it sits and it sits. The courts have not monitored the collection of these fines by the Department, or by the U.S. Attorney's Offices, because judges are busy. So they just lay there dormant, and we need a system—especially under this new law which requires the Commission to monitor fines, and all sentences—we need a system which is going to bring information to Chief District Judges on a monthly basis, as to the status of unpaid fines, and is going to give that same information to the United States' Attorney, and is going to cause the two of them to sit down, on a monthly basis, and say, here are a flock of fines that are unpaid.

And the Chief Judge then says to the prosecutor: what are we going to do about it? And when a fine goes unpaid, it breeds disrespect for law, so——

Senator **Kennedy**. Where does the money go now on the fines? I mean, I guess some goes——

Judge **Tjoflat**. It goes to the United States Treasury, and it goes there two ways. It either is collected by the clerk, simply because a defendant walks in and pays it, or the probation officer gives it to the clerk, or, it is collected by the United States Attorney. The debate has been over who ought to receive the money.

Senator **Kennedy**. I am wondering, and would be interested in what reaction my colleague from Pennsylvania might have, whether you might earmark some of that for prisons?

Ms. **Massey**. Senator, it goes for the victim's fund. It goes into the Treasury and into the victim's fund.

Senator **Kennedy**. But does it all go for victims?

Ms. **Massey**. That is correct.

Senator **Kennedy**. I see. It all goes there.

Judge **Tjoflat**. And we think, Senator, that this arrangement that we have worked out with the Department will result in far more collections than the overhead will impose on the system.

I will be happy to answer any questions that you might have, Senator.

Senator **Kennedy**. Let me ask a question to both of you, which I asked Judge Becker, and that is, if you eliminated the petty offenses, how much of a relief do you think that that provides, in terms of the ability to deal with the guidelines? Is that a modest——

Judge **Tjoflat**. Well, Senator, a lot of the cases, where the indictment and the plea, and the sentence are imposed in one day, are cases in which the individual is sent back to Mexico, say, because he came across the border illegally.

And they are not incarcerated in a prison. I think what is going to happen, as a practical matter, is that they are going to do exactly what they have been doing now. The District Judge is going to take the indictment, entertain a plea, sentence the defendant, suspend the sentence, and send him across the border.

The defendant is not going to appeal, the Government is not going to appeal, and that will be the result. I do not think that Judge Becker meant to imply that in every one of those cases, a pre-sentence report of the sort commanded by the guidelines and our manual is going to be prepared.

Besides that, under Rule 32, the District Judge has the authority not to have a pre-sentence investigation conducted.

Senator **Kennedy**. I recognize Senator Specter.

Senator **Specter**. Thank you very much, Mr. Chairman.

At the outset, I compliment you judges on your work on this enormous task. It is very important, and I am just delighted to see the progress which you have made.

Judge Becker has kept me abreast of the work in these lines, because he and I have had a very close relationship since colleague and law-school days, and I know of the tremendous effort and work which has gone into the undertaking.

Judge Becker, I would like to put on the record the issue that you and I had discussed, privately, with respect to the problem on appeal, where there may be a need to structure some appellate authority, where there appears to the appellate courts to be some gross miscarriage of justice; where, under the existing statute, some say that there is not any discretion on the part of the appellate court.

I do not know that I have articulated that with sufficient precision, but you can help me.

Judge **Becker**. Well, let me just say, at this point I have to take off my Judicial Conference hat. I came here representing the Conference, and I do want to make perfectly clear, that notwithstanding the comments of Judge Mazzone and Judge Tjoflat, the position of the Judicial Conference, representing the troops in the field, is that we need time.

Now Judge Newman, in testimony before the House Judiciary Committee, made a proposal for a judicial safety valve. There may be some very exceptional case that will not fit in with the departures, or where a departure was not chosen, and where the court of appeals feels that the sentence was plainly excessive or manifestly excessive, or some equivalent formulation.

Judge Newman has proposed that there be some judicial safety valve that the court of appeals, if it found an excessive sentence, would have the power to review it and set it aside.

Speaking only for myself at this point, I think it would be a good idea. I think that would be worthy legislation.

Senator **Specter**. Is there any aspect, on the other side of the coin, on a sentence which was——

Judge **Becker**. I think that it could equally be—I think what is "sauce for the goose is sauce for the gander," and I think if you are going to put in a safety valve for excess, I think you can put in a safety valve for a plainly overly lenient sentence. I would endorse that as well.

Senator **Specter**. I would be interested in Judge Tjoflat's view on that, and Judge Mazzone's view as well.

Judge **Tjoflat**. Senator, we have an adversary sentencing hearing here, under this model, and the district court has got the ability to go above the guidelines or go below the guidelines.

I agree, that there may be a case in which you would have a gross miscarriage of justice, and the court of appeals ought to be able to do something about it, and I do not see why, under this law, it could not, for this reason.

If it is a gross miscarriage of justice to impose a given sentence, that gross miscarriage of justice is going to be developed on the record in the district court.

All the reasons why the resultant sentence is awful are going to be developed. And I cannot imagine the defendant, say, if it is a miscarriage against him, is not going to articulate that in the court of appeals.

Now if the sentence happens to be within the guideline range, and there has been no mistake in the findings of fact, the argument is, in effect, that the guideline is bad. That it, as a whole, works a gross miscarriage of justice.

And I cannot imagine that not being reviewable in the court of appeals. But I have hard time envisioning the case.

Senator SPECTER. You think the issue can be dealt with without amendment?

Judge TJOFLAT. Yes. We are assuming a model in which you have a competent prosecutor and a competent defense counsel, and that the issue of the reasonableness of the sentence is thoroughly hashed out in the district court.

Judge MAZZONE. Senator Specter, I might add to that, that since September I have been applying the guidelines on an alternative basis, and in that time I have run across a case that fits within Judge Newman's concerns, and these concerns, it turned on whether or not a Marine barracks is a residence for the purposes of applying the burglary offense level.

If it is a residence, it escalates the level significantly, and whether or not a Marine barracks is a residence is the question.

The United States Attorney recommended a split sentence of 30 days. I imposed a straight probationary term with a suspended sentence. The guidelines called for a 24- to 30-month sentence, and there was not really any room in there to depart. That is the kind of a situation to which I think Judge Newman called your attention to.

I do not know how to do it because I do not know how to draft the language. I know that in the training material that we have sent out, and are sending out, there is a memorandum for processing appeals, and there are the bases on which the appeals are listed.

We do not have one down there that calls for gross injustice, or beyond the contemplation of the guidelines, or whatever, so I do not know how to draft it.

It might happen, it has happened in my case, I do not know how to draft language, or I have not put my mind to drafting language that would cover it. But I think, like everything else Judge Newman says, it is a thoughtful and typical problem, and something should be done about it.

Senator SPECTER. So you were able to solve it, of course, because as a district judge you could apply the discretion, but had you sentenced within the guidelines, your point is that the appellate court would have been handcuffed?

Judge MAZZONE. I do not think they could have handled it under the present language. As I say, maybe some language could be inserted here to say that in cases in which the interest of justice serves, the defendant may take an appeal from a certain sentence, even though it is within the range.

I just do not know how to do that, just yet. I am always impressed, as I say, with what Judge Newman says, and maybe something can be done about it.

Senator SPECTER. Thank you very much.

Judge TJOFLAT. Senator, can I add a word? I am concerned about judges on the courts of appeals having, in effect, the power to resentence under some interest of justice langauge, or something of that sort.

I do not mean to demean Judge Newman's concern. Everybody sees sentences under today's law, and it is hard to separate sentences under today's law from sentences that will be imposed under this model, in which there has been a gross miscarriage of justice, and appellate judges see that, and they have no power to review the sentence and they are very disturbed.

But if the Congress should write into the standard of review provisions of this law, in my view, an equitable provision, then you are going to breed—the first reaction is going to be that district judges are going to say, well, it really does not make any difference whether I abide by the law because there will be an appeal, no matter what, on the ground that this sentence is unjust somehow.

The more you take away from the district judges the responsibility of coming to grips with the sentence and applying this law, the more you are going to have original sentencing in the courts of appeals, and they are far removed from the case, and lots of appellate judges have never been in a courtroom in their life.

They have never seen a defendant. They have never read a presentence report. And one of the amendments in the package before you says that not only will courts of appeals—as is now the law—give deference to district judge findings of fact, unless they are clearly erroneous—but they will also give deference to district judge application of the guidelines to the facts, and the reason for that amendment, which is recommended by the Sentencing Commission, the Judicial Conference, and the Department of Justice, is that district judges are on the scene and have a "hands on" feel for the case.

And in a debatable situation, where you have sort of a mixed law/fact situation, in the case that Judge Mazzone mentioned, where the district judge may want to say that a barracks is not a residence because that is a reasonable way to read the guideline, the court of appeals ought to give deference to that reading.

Senator **Specter**. Well, it certainly is not easy, and Senator Kennedy and I will pour over it, and we will come to a judgment, even though neither of us has ever been either a district judge or a circuit judge.

Judge **Tjoflat**. Well, you have prosecuted.

Senator **Specter**. Well, we are not entirely unfamiliar with the problem, but neither of us has been a district judge or a circuit judge.

Senator **Kennedy**. I want to thank you all very much for your excellent presentation, and I think the one thing that all of us understood, who supported the legislation, is that this is a continuing process.

No one is just going to drop this and move away from it. We want to be responsive, we want to work closely with all of you, we want to hear from you, frequently, and we want to be responsive to the concerns of the conference. You have made an excellent presentation. Thank you very, very much.

[Response to questions of Senator Biden:]

United States Court of Appeals
Eleventh Judicial Circuit

Gerald Bard Tjoflat
Circuit Judge
Jacksonville, Florida 32201

November 4, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Senate Dirksen Office Building
Washington, D. C. 20510-6275

Dear Mr. Chairman:

I write to respond to the two questions you posed in your letter of October 28.

> "1. The Sentencing Reform Act, as currently written, contains some provisions relating to the abolition of the Parole Commission that may provide an unintended windfall for the most dangerous criminals in the penal system. The law now requires the Parole Commission to set release dates within the parole guidelines for those criminals before the Commission goes out of existence five years from now. As I understand it, that would mean early release for the people who had committed the most serious offenses.
>
>> "a. The Judicial Conference is supporting an amendment to the Act to deal with this problem. Could you please explain this amendment?"

Speaking for the Judicial Conference, I recommend that you delete the following language from Section 3553(b)(3) of Title 18: "that is within the range that applies to the prisoner under the applicable parole guidelines" and substitute therefor: "pursuant to Section 4206 of Title 18." This will eliminate the unintended windfall that concerns your committee.

> "2. Current law also lacks any provision for dealing with offenders entitled to be sentenced under the old law who come into the system after the Parole Commission goes out of existence. The

> proposed amendment would transfer the Parole Commission's duties relating to 'old law' offenders to the Bureau of Prisons.
>
> > "a. Why is the Bureau of Prisons the appropriate entity to take over this responsibility?"

Again, speaking for the Judicial Conference, I recommend that an entity within the Executive Branch be given the responsibility of discharging the Parole Commission's duties (given that the making of parole decisions is an Executive Branch rather than a Judicial Branch function). The Conference takes no position as to whether the Bureau of Prisons as opposed to some other Executive Branch entity, including the Parole Commission itself, is the appropriate entity to carry out the Commission's function.

If you have any questions about my responses, please do not hesitate to call me.

Sincerely,

Senator KENNEDY. Our final panel consists of Samuel Buffone who chairs the American Bar Association's criminal justice section, and appears today on behalf of the ABA, and Tommaso Rendino, the president of the Federal Probation Officers Association.

We want to welcome you both.

Why don't you begin, Mr. Buffone.

STATEMENTS OF A PANEL CONSISTING OF SAMUEL BUFFONE, AMERICAN BAR ASSOCIATION, AND TOMMASO RENDINO, FEDERAL PROBATION OFFICERS ASSOCIATION

Mr. BUFFONE. Senator Kennedy, Members of the Subcommittee, thank you for giving the American Bar Association an opportunity to appear and testify today.

I appear today on behalf of the 330,000 members of the American Bar Association, in my capacity as chairman of the ABA's Criminal Justice Section's Committee on the Sentencing Commission.

I would like to establish, at the outset, the bar association's longstanding and deeply seated commitment to a guidelines system, a position that I might add, has not often been appreciated.

We have worked in the development of our Criminal Justice Standards for over a decade now, and advocated in this body, and elsewhere, the adoption of a guideline system.

Based upon our longstanding advocacy for such a system, we wish to express our concern that the work product of the Sentencing Commission, and the guidelines, as currently formulated, perhaps may be misinterpreted as an end to this process rather than a beginning.

In our written testimony submitted to the Committee, we have outlined many of our substantive concerns with the guidelines, as drafted.

I would like to address today, in the limited time available to me, two additional points that were not covered in our written testimony.

First, Senator, and Members of the subcommittee, the guideline process is indeed a continuing one, and here, the bar association has some concern.

In the work of the Sentencing Commission, we have appeared and testified, and we found the process to be an open, fair, full and complete one.

In its final stages, the Commission's last draft was not the subject, because of time constraints, of the same kind of open and public consideration and commentary that the earlier drafts had been.

The Commission is now in the process of issuing revised commentary to the draft. Once again, that revised commentary has not been made publicly available, and there has not been an opportunity for input into the process.

We hope that the process, as it goes forward, from here on, will in fact be an open and complete one, and that the opportunity for ongoing comments, for a working relationship between the Commission, the bench, and the bar, will be a reality.

Our second point is to stress to the Committee the importance of flexibility in the guidelines. One of the provisions of the guidelines that the bar association was most supportive of was the broadly formulated departure language that appeared in the commentary.

We remain supportive of such broadly formulated departure langauge. We believe that departures are the safety valve. We find them to be a key to successful implementation of the guidelines.

The bar association, in the past, strenuously advocated a delay in implementation. Given events in the House of Representatives, we are not here today arguing for delay, only because it is our view that the political realities are that delay is impossible.

We look ahead to implementation. We look ahead to what we believe are significant problems in implementation, and we believe that a clear understanding of flexibility on departures is the best way to ease those problems and to assure successful implementation.

We have expressed ongoing concern over a number of other factors that I would like to briefly raise. One is the availability of probation. We believe that probation and alternative sentences are important components of any sentencing system and are critical of the restrictions on probation and alternative sentencing that we find inherent in the guidelines.

We believe that judges should be given substantially more authority than our reading of the guidelines gives to them, to consider offender and offense characteristics.

We believe that—a point that I raised earlier—while the guidelines permit departures, it is critical that a clear message go to the district court judges, that departures are in fact contemplated and reasonable, that they are the important safety valve identified by the commentary to the guidelines and by us in our earlier testimony.

And finally, we believe that the absence of any clearly defined procedures for implementation of the guidelines calls for a cooperative relationship between everyone who is going to be called upon to administer these guidelines, and that the procedural questions are going to be raised more quickly than—it is our view—you have heard in testimony from others this morning.

We believe these cases are going to be litigated and litigated quickly. If there are a relatively small volume of cases coming up, those cases are going to present each and every one of the procedural questions.

As defense attorneys and prosecutors grapple with how they are going to conduct fact-finding hearings, with how they are going to implement these guidelines, you are going to have procedural confusion.

The best way to eliminate that confusion we thought was delay. Absent delay, there has to be an understanding that this is in fact a flexible system. Thank you for the opportunity to appear.

[The statement of Mr. Buffone follows:]

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF SAMUEL J. BUFFONE

CHAIRPERSON
COMMITTEE ON THE U.S. SENTENCING COMMISSION
SECTION OF CRIMINAL JUSTICE
AMERICAN BAR ASSOCIATION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON THE
U.S. SENTENCING COMMISSION
SENTENCING GUIDELINES

OCTOBER 22, 1987

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

My name is Samuel J. Buffone. I have been designated by American Bar Association President Eugene C. Thomas to appear before you today on behalf of the 330,000 members of the American Bar Association. I am Chairman of the ABA's Criminal Justice Section Committee on the U.S. Sentencing Commission.

Just as the Association is reflective of the legal profession as a whole, so my Committee reflects a broad cross-section of the criminal justice system - prosecutors, defense lawyers, academics, and court administrators. When the Committee was established in 1985 as the Association's liaison point with the Sentencing Commission, it drew representation (and expertise) from the other ABA Criminal Justice Section Committees particularly concerned with the criminal justice system and the sentencing function.

I would like to establish at the outset the Association's long-standing support for the general concept of a sentencing guideline system. This support is founded in the Association's twenty-five year history of development and refinement of its Standards for Criminal Justice (Standards) including the specific chapter on Sentencing Alternatives and Procedures. While I will describe these Standards and their adoption fully later in my testimony, I wish to emphasize now that the Association's approach to the work product of the Sentencing Commission is based in large part on a comparison with our own Standards and the extended process of debate, study and constant revision that has gone into them. In addition, our comments draw heavily on the Association's collective experience as an organization representative of judges, defense attorneys, prosecutors, court administrators, academicians and others involved in the day-to-day workings of the criminal justice system.

We appreciate the opportunity to express our views to you. As an organization both deeply committed to the guideline concept and concerned with the practical implications of implementation of any change in the sentencing system, we are here today to express our deep concern over the April 13, 1987 Sentencing Guidelines and Policy Statements issued by the United States Sentencing Commission (Guidelines). While we view the Commission's work as significant progress towards our shared goal of workable Guidelines, that goal is far from being achieved.

We have substantive concerns with the Guidelines, based upon our Standards, as well as concerns about a series of practical problems that create a risk of a lack of uniformity in procedural implementation of the guidelines and an extended period of uncertainty. The hasty, eleventh hour preparation and release of the final Guidelines, which included significant changes from earlier drafts, without an opportunity for public comment or revision, has resulted in an incomplete set of Guidelines. As both incomplete and untested by the critical comments of those who will be called upon to implement them, they will fail to command the acceptance of judges, lawyers, and criminal justice professionals necessary for their successful implementation. The absence of any analysis of the range of procedural problems surrounding implementation, such as the numerous unresolved issues involving the greatly expanded sentencing fact-finding process, creates the possibility of procedural chaos as numerous Federal courts seek to resolve these issues with little guidance. Even if this acceptance can be achieved, additional efforts are necessary to minimize the risk of protracted litigation over implementation procedures.

The Association's primary concerns with the Guidelines are these:

- they limit, in an unprecedented fashion, the availability of probation and other non-incarcerative sentences;
- they substantially reduce the sentencing judge's ability to consider the broad-range of offense and offender characteristics that may be relevant in a particular case;
- while they permit departures, the Commission failed to provide clear guidance regarding departures and in particular failed to recognize a broad enough range of justifications for departure;
- the absence of clearly defined procedures and standards will result in a flood of inefficient and time-consuming litigation in the district courts and courts of appeals;
- implementation may result in a dramatic increase in prison population well beyond existing capacities.

We are deeply concerned that the implementation of the existing Guidelines on November 1 will be viewed as the end of a process rather than a beginning. While the Guideline drafting process was initially an open and thorough one, the release of the Commission's final draft was without benefit of comment or debate. Similarly the drafting of recently revised commentary was done without notice or opportunity for comment by any interested party other than the Department of Justice. For the Guidelines to fulfill their expressed mandate, the Commission must closely examine and reevaluate its future role. We urge it to immediately establish procedures and lines of communication to permit a shared process of development to go forward.

As an Association we have supported enactment of comprehensive criminal code reform including reform of the sentencing process. We have supported and actively participated in the processes of the Sentencing Commission. Our long history of support for sentencing Guidelines and our active involvement in this process is the root of our concern that the absence of a flexible and open process will result in a setback for the Guidelines concept. While we commend the effort of the Sentencing Commission in establishing an administrative process, conducting extensive fact-finding and beginning the process of drafting Guidelines, we do not believe that this process is complete. In this respect we believe that our own internal processes are a convenient reference point. The Association has spent years in studying and working towards the positions reflected in our Standards. Even these Standards, however, as comprehensive as they are, come nowhere near the detail contained in the sentencing Guidelines. Similarly, the process by which Congress made the determination that there should be a dramatic overhaul of the sentencing system spanned a ten year period and included numerous hearings and re-drafts of legislation.

Once the basic policy decisions were made it was, with the benefit of hindsight, unrealistic to expect the Commission to fully accomplish its task on its alloted schedule. The Commission's process represents a significant step forward. The Commission -- and interested parties -- have learned a great deal about the guideline drafting concept and we find much to commend in the Guidelines. The Commission's effort permits, for the first time, a clear understanding of the magnitude of the guideline drafting process. The consideration and rejection of numerous proposals in earlier drafts represents progress. The resolution of the real offense versus offense of conviction debate, the focus on the need for informed fact-finding, and recognition of the importance of the preservation of judicial discretion through departures, are important contributions. We especially support the Commission's request, in its transmittal letter to Congress, for a delay in implementation.

The absence of support for the Guidelines in the Bench and Bar threatens the very concept of sentencing Guidelines. The Guidelines lack broad support in the bench and bar, are not part of an integrated and thought out system of procedures for implementation, and contain internal inconsistencies and flaws. These problems may erode support for the Guidelines before they are even applied. As the ABA in its Standards and the Commission itself in its report have recognized, without support from the practicing bench and bar there is a strong possibility of subversion of the Guidelines through any variety of stratagems designed to avoid them.

The Association has previously recommended enactment of legislation to delay implementation of the Guidelines. Delay would have permitted testing, evaluation, education, and refinement of the Guidelines. We now recognize that delay is not probable and we are working to ease the implementation problem.

The Association believes that the Commission's work is unfinished. The Commission's final draft was an eleventh hour product that represented a wide swing from positions articulated in earlier drafts. Given the late hour of the final draft there was no opportunity for public comment or criticism. The lateness of the hour also prohibited the Commission from addressing numerous questions. The Commission has attempted to address some of these problems in its revised commentary but again the commentary was not subject to public review or comment. The Commission's letter of transmittal of the revised commentary contains at footnote 1 a statement that it did not intend to make any substantive changes and if a court determined any change was substantive the earlier commentary would control. This statement may be reflective of a narrow, rigid attitude towards the Guidelines that will restrict the Commission's ability to continue the progress toward true sentencing reform.

We recognize that the Commission is an on-going entity with authority to make changes in the Guidelines. This flexibility must be utilized to refine the Guidelines through an open and deliberate process.

There currently exists a risk of a chaotic implementation period. The absence of procedural clarity and generalized dissatisfaction with the Guidelines among judges and the practicing bar will place unnecessary strains on the guideline process. While the Guidelines require expanded fact-finding, they leave for judicial resolution the numerous difficult procedural issues that will accompany that process. The current absence of any clear definition of those problems or careful consideration of the best procedural solutions may cause a chaotic period of uncertainty as courts across the country wrestle with these issues. The resulting extended period of uncertainty could defeat a principal purpose of the legislation.

A partial solution to this problem is to educate the bench and bar. The American Bar Association takes very seriously its obligation to support education of the bar concerning practice under the new sentencing guidelines. Our goals in fashioning an effective program, recognizing the limitations of resources available to the ABA Section of Criminal Justice, were to reach as broad an audience as possible and to provide in-depth training at as minimal a cost as feasible. In addition, we are seeking to prepare materials that practitioners can use to familiarize themselves with the Guidelines and to think over strategies for practice post-November 1.

We held a major one-day program on the sentencing guidelines during the ABA's August 1987 Annual Meeting in San Francisco. In addition to policy discussions concerning the history and content of the Guidelines, a great deal of the program focused on "nuts and bolts" practice issues. Some 150 lawyers and judges attended the program. The program was videotaped and subsequently broadcast nationwide over the C-PAN Network.

Our major continuing legal education effort will take place in mid-January. It will consist of a satellite-transmitted two-day program to 50 sites around the county, utilizing the American Law Network. We hope to reach over 1,000 -- and as many as 2,000 -- practitioners through this closed-circuit telecast, many of whom will be the panel attorneys around the country who accept court-appointed cases. Still others will be community defenders and from Federal Public Defender offices. In addition, members of the "regular" private bar -- the white collar bar, tax practitioners, and others -- will be attending. Practice materials will be provided to all participants.

The two-day program is being sponsored by the Section of Criminal Justice, with the cosponsorship of the Complex Crimes Litigation Committee of the ABA Litigation Section, and the National Association of Criminal Defense Lawyers. It will use two hypothetical sentencing problems, one of which will be referenced by panelists when there is a need to discuss specific facts or how issues might be raised in a real case. Every participant will be given this hypothetical problem with their materials so that they can be familiar with the facts when the panelists refer to them. A second hypothetical will be given to the participants which they will "work through" following the program, with the assistance of an instructor at each of the 50 sites, recruited from local members of the bar already knowledgeable about the workings of the Guidelines. These attorneys will lead a discussion of the hypothetical problem, and also field attendee questions during program breaks.

Panels will cover:

- General application principles
- Handling departures from the Guidelines
- Litigating criminal history and criminal livelihood under the sentencing guidelines
- Raising constitutional and statutory issues under the Guidelines
- Sentencing procedures and plea agreements
- Sentencing appeals

In addition, the Section of Criminal Justice is moving ahead rapidly on plans for prompt publication of a book for defense lawyers and prosecutors regarding practice under the Guidelines. We hope to publish the book in a way which will facilitate broad dissemination.

The Lack of Clearly Defined Procedures and Standards.

The Commission reserved for judicial resolution the numerous procedural issues relating to implementation of the Guidelines. In its supplemental report at Chapter 6 it addressed sentencing procedures. The Commission first addressed on a philosophical level the need for fact-finding procedures. It found that rigorous fact-finding is necessary for proper application of the Guidelines, but then cited countervailing considerations of workability and administrative efficiency as precluding undue emphasis. The Commission noted the inherent inefficiency of turning sentencing fact-finding into mini-trials of guilt or innocence. The Commission resolved this dilemma by suggesting flexible procedures and stated that:

> With respect to sentencing issues that are genuinely disputed, the Commission chose simply to emphasize the importance of accuracy and fairness . . . . [M]ost of the procedural details are left for resolution by the sentencing court in light of the nature and importance of the particular issue and the context in which it arises. Existing precedent will provide some guidance; more extensive precedent will develop as the issues become more sharply defined in context.

Supplemental Report at pages 46-47.

The Commission isolated a list of complex procedural questions that it left for resolution by courts applying its Guidelines. Footnote 79, p. 47.

While the Association favors judicial resolution of these issues, we believe that the absence of any guidance on these numerous procedural issues creates the strong possibility of a chaotic implementation period. Numerous and diverse district courts across the country will be simultaneously faced with resolution of these difficult procedural decisions. They will be called upon to resolve matters of constitutional due process and procedural fairness as well as interpretation of the Commission's enabling legislation and the Guidelines. Defense attorneys and prosecutors attempting to engage in plea bargaining will be uncertain of procedural latitude in resolving contested factual issues. Prudent attorneys will attempt to avail themselves of the full panoply of available procedures resulting in cumbersome sentencing proceedings. As these procedural complexities are resolved on a case by case basis by numerous district court judges, in all likelihood widely divergent practices will evolve. These practices will slowly wind their ways through the courts of appeals and ultimately to the Supreme Court.

It is quite possible that there will be a lengthy two to three year period of uncertainty with the potential reversal of numerous sentencings as case law becomes clarified. The very purpose of the Guidelines -- to provide certainty and clarity -- will have been frustrated. Some progress has been made as individual judicial districts have appointed committees drawing on the expertise of prosecutors, defense attorneys and probation officers to consider ways to ease the implementation process. Progress has already been made. Several efforts to draft model rules are underway. The Commission should become actively involved in and promote such cooperative efforts.

Probation.

The Guidelines treatment of probation represents perhaps the most dramatic change from existing practice. Under current practice, approximately 50% of all Federal sentences are probationary or otherwise non-incarcerative. The Commission in its supplemental report at pages 60 and 61 and in Tables 2 and 3 pp. 68, 69, recognized that there would be a decline in the incidence of straight probation and that for some crimes the reduction would be "quite substantial." Our analysis of the

Guidelines indicates that the decrease in the availability of probation will in fact be significant.

The dramatic reduction in availability of probation is at odds with ABA Standards and poses an undue restriction on the discretion of the sentencing authority. The virtual abolition of probation for many categories of crimes will in our view also result in additional pressure on limited confinement resources. This increase is at odds with the requirements of Section 994(g) that the Commission seek to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons.

A cornerstone of the provisions of Chapter 18 of the Standards of Criminal Justice relating to Sentencing Alternative and Procedures is the least restrictive alternative provision contained in Standard 18-2.2. Standard 18-2.3 calls for the availability of nonincarcerative sentences for virtually every crime.

When probation is not appropriate, the least restrictive alternative principle directs the sentencing authority to search for another solution short of total confinement. Standard 18-2.4(a) calls for creativity in the construction of "intermediate sanctions."

The principle of the least restrictive alternative recognizes that there are instances in which incarceration is necessary. Standard 18-2.5(c) provides the sentencing authority with some examples of factors that legitimize or fail to legitimize sentences of total confinement. Finally, Standard 18-3.1(c) recognizes that alternative sanctions must be integrated into sentencing Guidelines -- both to assure that the least restrictive alternative principle will be implemented, and to see that it will be implemented consistently and fairly. The position of the ABA, as set out in the Standards, is in our view consistent with the Guidelines legislation.

The Commission appears to believe that 28 U.S.C. § 994(b) (as amended) prohibits the use of probation for offenses for which a guideline sentence would otherwise exceed six months. There is no such limitation in the enabling legislation. The second sentence of section 944(b) merely serves to limit the breadth of the range of sentences to imprisonment. It does not purport to limit the availability of probation as an alternative to a sentence of any length. Section 994(a)(1) specifically distinguishes between "the determination whether to impose a sentence to probation, a fine or term of imprisonment" (subsection (A)) and "the determination as to the appropriate amount of the fine or the appropriate length of a term of probation or a term of imprisonment" (subsection (B)). The § 994(b) 25% limitation applies only to the latter determination. Further, 18 U.S.C. § 3551(b) explicitly provides that "an individual found guilty of an offense shall be sentenced . . . to (1) a term of probation . . . or (3) a term of imprisonment." And 18 U.S.C. § 3561 provides that "a defendant who has been found guilty of an offense may be sentenced to a term of probation unless (1) the offense is a Class A or Class B felony; (2) the offense is an offense for which probation has been expressly precluded; or (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense." Class A and B felonies are defined generally in 18 U.S.C. § 3359 as offenses for which the maximum authorized term of imprisonment is life or twenty years or more, respectively. Consequently, the Congress clearly intended to bar probation as an alternative for crimes punishable by imprisonment for twenty years or more -- not for crimes punishable by imprisonment for more than six months.

This interpretation is supported by the legislative history that accompanied the Comprehensive Crime Control Act of 1984. Senate Report No. 98-225 states, at page 88, ". . . 18 U.S.C. § 3561 authorized the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A or B felony or an offense for which probation has been expressly precluded, or the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense." (emphasis added). ". . . 18 U.S.C. § 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." The Commission failed to recognize probation as a distinct and separate sentence that is independent of sentences of imprisonment to which are applicable the 25% limitation of 28 U.S.C. § 994(b).

In explaining § 3562, the Senate Report noted, "The effect of these considerations is to require the court to focus carefully upon the needs of the defendants and the needs of society." (at page 91). "This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose."

Finally, § 994(j) of the Commission's enabling legislation required it to "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Section 994(g) requires the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

The Commission's unprecedented restriction of the availability of probation directly conflicts with these statutory mandates. We can perceive no statutory reason, therefore, why a sentence of probation should not be an available alternative well beyond the limit currently imposed by the Guidelines.

The research on sentencing shows that judges use different factors in reaching the "in/out" and "length of sentence" decisions. In general terms, the "in/out" (incarceration versus probation) decision correlates most strongly with offender characteristics, such as prior record and family and community ties. The "length of sentence" decision tends to reflect more strongly the specific elements of the current crime, e.g., weapon use and resultant harm. Research thus suggests that sentences to probation should not be merely a part of the same analytic continuum established to determine the length of sentences to imprisonment.

Section (a)(2)(D) of 18 U.S.C. § 3553 reinforces this reasoning. It requires the court to consider "the need for the sentence imposed" to accomplish four objectives, the last of which is "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Commission's limitation of probation effectively reads out of the statute this direction by the Congress that the judge take account of the offender's rehabilitation needs.

Further, 18 U.S.C. § 3553, which specifies the "factors to be considered in imposing a sentence," requires the court to consider "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). This specific statutory language was added by Congress to require consideration of all sentencing possibilities to insure "the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case." Senate Report No. 98-225, at page 3222.

Restrictions Upon the Judge's Authority to Take Into Account all Relevant Aspects of the Offense and the Offender.

While the Guidelines do permit a sentencing judge to consider certain offender and offense characteristics, they place undue restrictions on his ability to consider others. The worst manifestation of this is the Guidelines' treatment of offender characteristics.

The Guidelines treat only a few offender characteristics as normal determinants of sentences. §§ 4A1.1 and .2. They treat others as possible bases for departures from the Guidelines, but not as black-letter criteria for sentences. § 4A1.3. They expressly forbid consideration of still other offender characteristics. § 5H1.3. They implicitly forbid reliance on still others, by illustrating grounds for departure so narrowly as to create the negative implication that other kinds of offender characteristics would not justify departures. § 4A1.3. Finally, even where the Guidelines do cover characteristics of the offender as well as the offense, they give inadequate weight to the offender characteristics. Compare § 2J1.3 and the Sentencing Table (base offense level for subornation of perjury is 20, for at least 33-41 months in prison, if the offender suborned the perjury by causing or threatening physical injury to a person or property, and otherwise is 12, for at least 10-16 months in prison) with §§ 4A1.1 and .2 and the Sentencing Table (a sentence for subornation of perjury is not increased at all for the fact that the offender previously had been convicted and had received a sentence of probation for an earlier subornation of perjury).

The Guidelines' curtailment and undervaluation of offender characteristics are a radical departure from the past federal practice. Congress gave no indication that it intended to curtail reliance on offender characteristics. On the contrary, some provisions of the 1984 legislation appear based on the view that the broadest variety of offender characteristics were to remain relevant under the Guidelines. 18 U.S.C. §§ 3551(a) and 3553(a)(2) (". . . a defendant who has been found guilty . . . shall be sentenced . . . so as to achieve the purposes . . . of just punishment, deterrence, protection of the public and correctional treatment of the offender."); Fed.R.Crim.P. 32(c)(2)(A) (as amended in 1984) ("The Report of the presentence investigation shall contain . . . information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentencing or in the correctional treatment of the defendant . . .").

The Guidelines should be revised so that a judge can consider and duly weigh every aspect of an offender's past conduct and experiences that bears upon his character, his propensity for future crime, and his amenability to various types of treatment and supervision. Standards 18-3.2(a), 18-5.1(d), (e). The Guidelines in their present form, hinder and even forbid reliance on many sentencing factors that are crucial for control of crime. The result will be ineffective and disparate sentences.

The Guidelines Fail to Set Out Clear Standards for Departure.

The Association believes that the statutory goals of sentencing consistency, fairness, and flexibility are consistent with each other and with the principles of the ABA Standards. Standard 18-3.1(b) provides that:

> The proper function of sentencing Guidelines is to shape and structure judicial discretion, not replace it with mechanical rules.

The commentary to Standard 18-3.1 argues that the adoption of Guidelines:

> Offers the means of achieving better individualization because they provide a framework within which more information can be brought to bear, more variables considered, and the exercise of discretion thus qualitatively improved. In short, they not only assist the judge in avoiding unwanted disparities, but by in effect providing the court with a checklist of factors that should be considered, they can also serve to enhance the court's consciousness of factors which indicate that differences in treatment are indeed thoroughly warranted.

This important aspect of the standard is effectuated by Standard 18-3.1(b). In addition to its rejection of mechanical rules it recommends that the delegation of authority to a Guidelines agency be counter-balanced by a clear allocation of responsibility to the sentencing court to depart from the applicable guideline range when substantial mitigating or aggravating factors are present that were not adequately taken into consideration by the guideline drafting agency. The language of the Standards is mirrored closely in Section 3553(b) and the Policy Statement in Part K dealing with departures. While departures are clearly contemplated by the Guidelines, a sentencing judge is sent an unclear signal by the Guidelines as to when such departures are appropriate. The Supplemental Report of the Sentencing Commission at page 17 states that departures are warranted in unusual cases.

It is the view of the Association that the current structure of the Guidelines will militate against departures. Judges will in all likelihood be unwilling to consider important factors such as availability of probation and offense and offender characteristics if forced to apply them only in the context of uncertain departure rules. The Guidelines and explanatory materials that accompany them provide a less than clear roadmap to a judge attempting to determine when departure is appropriate. The guideline worksheets seem to contemplate few, if any, departures. This lack of clarity may be the result of the eleventh hour treatment of the issues by the Commission and reflective of a lack of decision by the Commission itself of when departures are appropriate. It is our understanding that the Department of Justice is considering Guidelines which would require U.S. Attorney approval of any request for departure and central Washington, D.C. review of all but the most routine departures. Such a policy would clearly define departures as extraordinary rather than the more flexible protection against an unduly mechanical system that we believe is necessary.

Implementation of the Proposed Guidelines May Result in a Dramatic Increase in Federal Prison Population.

Congress and the Commission should consider the severity of the proposed federal sentencing policy contained in current statutes (particularly with respect to drug offenders) and the proposed Guidelines, and determine whether or not the projected dramatic increases in federal prison populations are necessary to justice and public safety.

In its Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1977), the Commission reports the results of its "impact study" which concludes that, if the proposed sentencing Guidelines are implemented, the number of federal prisoners will increase by 71% to 88% within the first five years and from 150% to 271% within fifteen years, depending upon the assumptions used in the forecasts. The Commission's impact study concludes that the expected dramatic increases in federal prison populations are attributable primarily to current prosecution policies, to the mandatory minimum drug sentences enacted into law by the Congress in 1986, and by the "career criminal" provisions of the Sentencing Reform Act itself. The Commission concludes that the effects of the Guidelines, independent of these other causes, are relatively minimal.

The data from the Commission's report is summarized in Table 1, attached to this statement.

Taking the Commission's figures at face value, it is clear that the proposed sentencing Guidelines fail altogether to meet Congress' hope, expressed in the requirement of 28 U.S.C. §

994(g), that the Commission consider the nature and capacity of federal penal, correctional and other facilities and services available and "minimize the likelihood" that federal prison population will exceed the capacity of the federal prisons. To the contrary, implementation of the proposed Guidelines may result in dramatic increases in federal prisoners, wholly inconsistent with current Bureau of Prisons capacity.

Even assuming the accuracy of the Commission's impact projections, and the Commission's attribution of the causes of the projected prison population increases, the dramatic prison population increases reflected in those projections are by themselves sufficient ground for the Congress to consider the wisdom of such sharp increases in prison population.

The negative consequences of such population growth include:

- the need for the Bureau of Prisons to begin immediately the construction of new federal prisons at an unprecedented rate, producing at least a 75% increase in total federal correctional facilities within the next five years;

- the need for Congress to budget capital funds for 150% to 300% increase in federal correctional facilities over the next 15 years;

- the hiring and training of a proportionate number of new guards and federal correctional workers;

- corresponding increases in federal correctional expenditures in times of grave concern about federal budget deficits; and

- the very real potential for a federal "Attica" caused by the inability of any correctional system to absorb such dramatic population increases without substantial costs to facilities management, and, ultimately, to the security of inmates and employees.

The Congress should not impose these costs and risks without seriously revisiting all the policies that contribute to this result.

The ABA and the Sentencing Commission Process

A word of background about our own policies may be helpful. Our Committee was established in 1985 as the Association's liaison point with the Sentencing Commission. Since its initial organization the Committee has engaged in a comprehensive effort to evaluate the Guidelines, participate in the Commission's process and seek the views of our diverse membership. We have welcomed the opportunity to work closely with the Commission since its appointment.

Our roots with the Guideline issue stretch back to the 1970's. At that time, the ABA was actively engaged in the legislative efforts to re-codify the Federal criminal laws. A proposal for a sentencing commission was first incorporated in that process in 1975 and the Association firmly endorsed it.

The origins of the ABA Standards in fact dates back to May of 1963 when the Institute of Judicial Administration (IJA) proposed to several ABA leaders that the IJA and ABA undertake to formulate minimum standards in the field of criminal justice.

The Committee established six advisory committees, each composed of ten to eleven members to focus on specific areas in which standards would be written. Specific standards were proposed and adopted for police function, pre-trial proceedings, criminal trial, fair trial and free press, prosecution and defense function and of particular significance, sentencing and review. In 1969 a seventh advisory committee was added to draft standards on the function of the trial judge.

Thousands of copies of tentative drafts were distributed to the bench and bar for comment, and eventually 17 sets of standards were developed and approved by the ABA House of Delegates in 1968, 1970, 1971 and 1972. While adoption was preceded by an extended process of study and debate, it signaled the beginning of an equally lengthy implementation project. A ten year implementation project was undertaken by the Section of Criminal Justice, with Association and LEAA funding, to encourage adoption of the standards in every state and in the Federal system. Many states, revising their rules of criminal procedure during the 1970's, did implement many recommendations in the ABA standards. The Speedy Trial Standards were instrumental in encouraging the adoption of the 1974 Speedy Trial Act, the Discovery and Procedure Before Trial Standards helped bring broad new discovery rules to many jurisdictions and the standards have been cited by appellate courts in excess of 12,000 times.

In late 1976, the ABA's Special Committee on Standards launched a major project to produce a second edition of the Standards. Recognizing that almost ten years had passed since many of the first edition Standards had been approved, and that all of the Standards could use some revisiting in light of Supreme Court decisions and other developments, the Special Committee set up drafting task forces and began what was a four-year project to update each of the volumes. As with the first edition, thousands of copies of the tentative draft were circulated for comment; revisions were made; and final proposed "black letter" standards and commentary were presented to the ABA House of Delegates for approval in 1978, 1979 and 1980.

Of particular interest to the Sentencing Commission process are the provisions of Chapter 14 of the Standards dealing with pleas of guilty and Chapter 18 of the Standards which deals with sentencing alternatives and procedures in considerable detail.

The introduction to Chapter 18 dealing with sentencing alternatives and procedures begins with the observation that probably no other area of criminal justice had witnessed as intense a debate over fundamental assumptions as the sentencing process:

> These and other questions have spawned a number of competing proposals. In this war of models, ideas once taken as self-evident have been discarded and others, long-dormant, have re-emerged to a sudden popularity.

This quote could apply equally to an analysis of the Commission's process. The radical swings and policy positions and assumptions contained in its various drafts are reflective of the long-standing national debate over sentencing policies and priorities.

The introduction to Chapter 18 goes on to adopt a centrist approach founded on the experience of the bench and bar and the long history of scholarly consideration of the issues. The revised Standards contain several significant changes in their sentencing provisions. The first was the adoption of a guideline system. An important component of this adoption was a recommendation that an administrative agency be established with an oversight capacity to deal with the many complex and technical problems posed by sentencing guidelines that are inappropriate for legislative determination. The adoption of a guideline concept was, however, linked to other important considerations. The first was a clear articulation that the goal of Guidelines is not to inhibit the individualization of justice but to enhance it by providing more information and guidance to the sentencing judge. The second important change in the Guidelines was the adoption of a general recommendation of non-incarcerative sentencing alternatives wherever possible. The guideline drafting agency was specifically instructed to factor the use of sentencing alternatives into any table of guideline sentencing ranges.

The introduction noted the increasing attacks on judicial discretion in the sentencing process. While it proposed to somewhat limit that discretion through the implementation of guidelines and the establishment of a guideline agency it favored reservation of broad judicial discretion.

The introduction ended with the statement that:

> Where it has not been necessary to change, it has been considered necessary not to change, since we know too little today to experiment casually with the liberty of any citizen, including the offender.

We urge Congress to adopt a similar attitude. As with our own standards, Congress has set out broad principles for implementation of a guideline system. Sentencing reform of the scale contemplated by the enabling legislation will work a sea change in the law. This dramatic event will not be without cost. We anticipate that some procedural confusion, initial missteps and corrections are inevitable, and urge the adoption of policies to minimize the resulting stress on the entire system.

Conclusion.

The Association appreciates the opportunity to share with you our views on this important subject. We look forward to working with the Commission and Congress on the continuing effort to implement sentencing reform.

SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS FOR AMERICAN BAR ASSOCIATION

1. You point out that the guidelines will require the development of new procedures and standards to deal with such issues as the admissibility of evidence and burden of proof at sentencing hearings.

   a. How are judges going to make the findings of fact required by the guidelines in the interim while such rules are being formulated? Is any guidance being given regarding the procedure to be followed?

   b. Some people have suggested that the judges will order the probation office to prepare the pre-sentence report, including the offense level calculation, before any hearing takes place, and that the hearing should then focus on the contested areas in the report. Does that seem like a sensible procedure?

   c. Is the ABA drafting a set of proposed procedures and standards? (If not, why not?)

2. You point out in your testimony that the guidelines limit the availablity of probationary sentences in instances where the guidelines call for a sentence of more than six months. If I understand you correctly, the ABA's position is that probation should always be an option, notwithstanding the sentencing range specified by the guidelines. That is, you think that even if the guidelines say that the sentence for a given tax evasion should be between four and five years, the court should be free to impose probation.

   a. What sense would it make to have the guidelines specify a range of years for a given offense if the court could always ignore the guideline and impose no incarceration at all? Wouldn't that create an enormous loophole for white collar criminals?

   b. Isn't probation always available in extraordinary cases when departure from the guidelines is warranted? In other words, to avoid creating a loophole, wouldn't it be better to leave probation as an option only when the court is required to give reasons for departing from the guidelines?

QUESTIONS FOR THE JUDICIAL CONFERENCE JUDGES AND THE AMERICAN BAR ASSOCIATION

DO YOU BELIEVE THAT WE SHOULD HAVE CRIMINAL SENTENCING GUIDELINES?--WHY?

DO YOU BELIEVE THAT THE GUIDELINES THAT APPARENTLY WILL BECOME EFFECTIVE ON NOVEMBER 1, WILL BE THE START OF AN EVOLUTIONARY PROCESS THAT WILL INCLUDE PERIODIC REVIEW OF THE OPERATION OF THE GUIDELINES, AND ULTIMATELY LEAD TOWARD THE GOAL OF A RATIONAL AND LEGITIMATE CRIMINAL SENTENCING SYSTEM WITHIN OUR FEDERAL COURTS?--WHY OR WHY NOT?

OTHER THAN DELAYING THEIR EFFECTIVE DATE, WHAT SPECIFIC CHANGES WOULD YOU LIKE TO SEE MADE IN THE SENTENCING GUIDELINES IN ORDER TO ACHIEVE THE FULL COOPERATION OF PRACTICING ATTORNEYS AND FEDERAL TRIAL COURT JUDGES, WHILE ALSO FULFILLING THE INTENT OF CONGRESS WHEN IT ORIGINALLY ENACTED THE LEGISLATION THAT LEAD TO THE PROMULGATION OF THE SENTENCING GUIDELINES?

ABA
AMERICAN BAR ASSOCIATION Section of Criminal Justice
1800 M Street, NW, 2nd Floor
South Lobby
Washington, DC 20036-5886
202/331-2260
ABA/net ABA128

CHAIRPERSON
John M. [illegible] Clerk
U.S. Court of Appeals 4th Circuit
10th & Main Streets
Richmond, VA 23219
(ABA/net ABA0400)
CHAIRPERSON-ELECT
Terence F. MacCarthy
Federal Defender Program
[illegible] Dearborn St., Ste. 3142
Chicago, IL 60604
VICE-CHAIRPERSON
Arthur C. Capps [illegible]
District Attorney
27th Judicial District of Texas
Court House, P.O. Box 540
Belton, TX 76513
SECRETARY
Frances D. Carter
1420 N Street, NW, Lower Level
Washington, DC 20005
ASSISTANT SECRETARY
Charles C. Cole
1130 Connecticut Avenue, NW
Washington, DC 20036
SECTION DELEGATE TO HOUSE OF DELEGATES
Sylvia Bacon
DC Superior Court
500 Indiana Avenue, NW
Washington, DC 20001
LAST RETIRING CHAIRPERSON
Professor Norman Lefstein
Chapel Hill, NC
(ABA/net ABA1553)
BOARD OF GOVERNORS LIAISON
Maxwell Heiman
Bristol, CT
COUNCIL
Roger M. Adelman
Washington, DC
Catherine L. Anderson
Minneapolis, MN
(ABA/net ABA2207)
Marvin E. Aspen
Chicago, IL
Michael L. Bender
Denver, CO
E. E. Bo Edwards III
Nashville, TN
Tom Foley
St. Paul, MN
Fred L. Foreman
Waukegan, IL
Nancy Gertner
Boston, MA
Sheldon Krantz
San Diego, CA
Frank Maloney
Austin, TX
E. Michael McCann
Milwaukee, WI
George J. Moscarino
Cleveland, OH
J. Kevin O'Brien
Washington, DC
Marvin G. Pickholz
Washington, DC
Paul F. Rothstein
Washington, DC
Donald E. Santarelli
Washington, DC
Andrew L. Sonner
Rockville, MD
Neal R. Sonnett
Miami, FL
Steven J. Twist
Phoenix, AZ
Peter F. Vaira
Philadelphia, PA
LAW STUDENT DIVISION LIAISON
[illegible] M. Augustine
Washington, DC
STAFF
[illegible]

April 6, 1988

Senator Joseph R. Biden, Jr.
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

I am writing to you in my capacity as Chairperson of the American Bar Association's, Criminal Justice Section Committee on the U.S. Sentencing Commission. On October 22, 1987 I appeared before the Senate Committee to testify about the Association's views on the Sentencing Guidelines. Following my testimony written questions were forwarded. I would like to respond to the questions.

Questions by Senator Grassley

1. Yes, the American Bar Association believes in criminal sentencing guidelines. The Association's long-standing support for the general concept of a sentencing guideline system is founded on the Association's twenty-five year history of development and refinement of its Standards for Criminal Justice (Standards) including the specific chapter on Sentencing Alternatives and Procedures. The Association's approach to the Commission's Guidelines draws heavily on the Standards' strong support for the concept of sentencing guidelines, the important role of a Commission like administrative agency and the need to channel judicial discretion and achieve fairness in sentencing.

2. Yes. The evolutionary nature of the guidelines has been confirmed by the Commission's recent amendments to the guidelines and public hearings at which it solicited a broad range of comments on proposed modifications. The Association has encouraged the Commission to engage in an open and continuing process of

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study and refinement of the guidelines. It is just such a role that is contemplated for a guidelines agency by the ABA Standards.

3. The ABA recommends the following basic changes in the guidelines:

- an increased availability of probation and other non-incarcerative sentences;
- an increase in the ability of the sentencing judge to consider the broad-range of offense and offender characteristics that may be relevant in a particular case;

The American Bar Association has additionally recommended a number of modifications to existing guidelines directly to the Commission.

Questions by Senator Biden

1. We believe that the resolution of these procedural issues is appropriately left to the courts. Our committee has collected a number of local rules changes adopted by individual district courts in order to implement the guidelines. We are also participating in efforts to further amend the Federal Rules.

While only limited data is available most probation offices appear to favor preparing the pre-sentence report, including guideline calculation, prior to the sentencing hearing. The prosecutor and defense attorney then report disputes which are the focus of the sentencing hearing. While we generally view this procedure as a rational one it may tax the limited resources of the probation officers to engage in fact finding. This is especially critical given the guidelines broad interpretation of relevant conduct and the resulting need to determine factual issues relating to uncharged conduct.

2. The Guidelines' treatment of probation represents perhaps the most dramatic change from existing practice. Under current practice, approximately 50% of all Federal sentences are probationary or otherwise non-incarcerative. The Commission in its supplemental report at pages 60 and 61 and in Tables 2 and 3 pp. 68, 69, recognized that there would be a decline in the incidence of straight probation and that for some crimes the reduction would be "quite substantial." Our analysis of the Guidelines indicates that the decrease in the availability of probation will in fact be significant.

The dramatic reduction in availability of probation is at odds with ABA Standards and poses an undue restriction on the discretion of the sentencing authority. The virtual abolition of probation for many categories of crimes will in our view also result in additional pressure on limited confinement resources.

The ABA favors an increase in the range of sentences for which probation is an available option under the guidelines. Such an option is currently only available up to a level six with no prior criminal history. An increase in availability above level six would not in our view create a loophole. Departures may be an appropriate vehicle for the rare cases calling for probation in the face of a substantial guideline sentence. However, it is an inappropriate means to utilize as a routine method by which to make probation available for the majority of cases, which are cases in which we believe it is an acceptable sentencing option.

Thank you for the opportunity to clarify our earlier testimony.

Sincerely,

Samuel Buffone

Samuel J. Buffone

SJB/ro

Senator KENNEDY. Thank you. Mr. Rendino.

Mr. RENDINO. Senator Kennedy, first of all, the Federal Probation Officers Association extends its very deep appreciation for the invitation to address the Committee. I will basically stand on the prepared statement which was submitted in advance but I would like to amplify one item, and very briefly bring up a couple of other items that have been brought to the Committee's attention just this morning.

We, in the Federal Probation Service, have a concern that because of the extra time that the guidelines will demand from the probation officers who will be in charge of preparing the worksheets for the district judges, that time will be taken away from our supervision duties.

We do not know how much more time is going to be needed because of the guidelines, but we are absolutely certain that it will take more time.

We do not want to fall into the trap of having a false promise to the American public that Federal probationers and prison releasees are being adequately monitored, when, in fact, the constraints on the Probation Service prohibit that.

We would like to have a continuing input to the Committee, and hope that the Committee will respond to our assessment of this issue.

The second point I want to bring up is the revised commentary that has been mentioned by my colleague to the right, and others before us. I think that may be an overblown issue.

I have a copy of the revised commentary. I cannot tell you that I have gone line by line, word by word, but I did spend a good deal of time last weekend looking it over, and basically, in my opinion anyway, it merely puts the relevant commentary under the relevant guideline. It is moving paragraphs around more than any substantive change that I have come across.

So I do not think that is going to be a problem. I am not certain why I have a copy, and others have not received a copy, but again, I do not think that is going to be a problem, and I think Brother Buffone may agree with me, once he gets access to the revised commentary.

There are a couple of other issues that have been addressed that the FPOA would like to endorse, and to highlight a couple that have not been mentioned today.

First off, the element of automation via computers will be of great assistance to the Probation Service in implementation of the guidelines. This has in fact started, as the Committee has heard. We merely would like to note, very strongly, that until every probation officer has a PC on his, or her desk, the full benefits of this will not be realized.

And when I say "full benefits," it will free up the probation officers from a lot of mechanical, routine duties so that our time can be better put elsewhere, supervising probationers, and prison releasees, and so forth.

We are concerned about the exclusion of petty offenses from the guidelines, and I would not want to be held exactly to these numbers, but my last recollection is that the district courts of the United States receive about 40,000 such cases a year.

If Federal probation officers are going to be spending untold hours preparing guideline worksheets on 40,000 petty offenders who are probably already back wherever it is they came from, it is going to be "busy work" that does no one any good, and in fact denigrates our professionalism, and our approach to the items of more concern to the public and to the Senate.

A couple of other sections in the amendments bill which are of grave concern to us is the—I believe it is Section 102, deletion of within guideline release date requirement, on so-called old-law offenders. Basically, the abolition of the Parole Commission says that, I believe 90 days in advance, that all remaining people under the old law, in the custody of the Federal Bureau of Prisons, must receive a release date within the Parole Commission's guidelines.

We think that just a cursory review by the Senate Judiciary Committee will quickly reveal to you that this gives a tremendous break to the worst offenders in the system.

The chronic recidivists, the most violent people, the people that probably should remain in prison much longer, will get a tremendous break under this and will be hitting the streets earlier than otherwise might be the case, and we would really like that issue attended to.

Of course the so-called *ex post facto* issue is of tremendous concern to us also, and we think that has probably been dealt with adequately, here, today, by previous speakers.

There are a couple of minor, well, technical amendments I guess is a better term, and in Sections 108, 112, and 113 of the amendments bill. Namely, the exclusion for serious crime, organizational offenders. These Class "A" and Class "B" corporate offenders, as it were, would not be eligible for probation, and we think that should be corrected.

There are several corporate defendants on probation in the system, and probation officers are doing a very fine job of monitoring their activities.

This clarification of early termination of probation and supervised release, which we would like to see in the amendment bill. Namely, if two years go by and a subject is on supervised release for five years, but for any number of substantially good reasons, that supervision period should be terminated and the probation officer's attention given elsewhere, that option ought to be available.

That is the end of my commentary, Senator, and, again, we really appreciate the opportunity.

[The statement of Mr. Rendino follows:]

FEDERAL PROBATION OFFICERS ASSOCIATION

PREPARED STATEMENT OF THE

FEDERAL PROBATION OFFICERS ASSOCIATION
(FPOA)

FOR THE

SENATE JUDICIARY COMMITTEE

22 OCTOBER 1987

HEARING ON THE SENTENCING GUIDELINES OF

THE UNITED STATES SENTENCING COMMISSION

DIRKSEN SENATE OFFICE BUILDING

WASHINGTON, D.C.

DELIVERED BY:

TOMMASO D. RENDINO
PRESIDENT - FPOA

Association Officers 1987

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Vice President Ralph Ardito United States Probation Officer Washington, D.C.	Treasurer Carol D. Erichsen Supervising U.S. Probation Officer Grand Rapids, MI

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Western States	Charles L. Stearns Supervising U.S. Probation Officer West Covina, CA	Affiliate Liaison

Ex Officio

Phillip J. Bigger Supervising U.S. Probation Officer Brooklyn, N.Y.	- Newsletter Editor

Mr. Chairman and Senators, I am Tommaso D. Rendino, President of the Federal Probation Officers Association and currently serving as United States Probation Officer in the District of Vermont, stationed at Burlington, along with liaison duties to local, provincial and federal law enforcement and criminal justice agencies in the Province of Quebec, Canada.

Upon my election in January, the main priority of the FPOA, for the foreseeable future, became cooperation with and assistance to the Sentencing Commission and I took the unusual step of establishing an ad hoc Committee of the Whole, consisting of the entire FPOA Board, as well as its newsletter editor, for the purpose of closely monitoring and analyzing the Commission's work. That priority remains in place today and likely will not change for at least a year. The reason for this is that guideline sentencing will drastically alter the definition of the role of the United States Probation Officer.

The FPOA has regularly offered, and will continue to offer, its considered opinions on the Commission's work and we are very grateful for the Commission's "open door" policy, particularly as fostered by Chairman Wilkins, along with the constant encouragement for imput from the field.

Today marks the first time that the FPOA has addressed the United States Senate and we offer our very great appreciation to the Committee for its invitation.

Sometimes it is necessary and beneficial to state or restate the obvious or, at least, what should be obvious. This is one of those times, as repeated experience has taught me and other members of the FPOA Board. The Congress established the U.S. Sentencing Commission in Chapter 58 of Title 28 of the U.S. Code, 28 U.S.C. 991, et seq. and the Congressional mandate went far beyond "enabling" legislation. In fact, Chapter 58 is much more directive than most legislation we have ever reviewed. Congress was very clear and forceful in announcing a new national policy on sentencing in the federal courts and Chapter 58 is in harmony with other recent Congressional pronouncements such as the revised bail laws, victim and witness protection provisions, the Anti-Drug Abuse Act of 1986 and enhanced fines and other monetary penalties. My point is that the Commission had much less operating room than might be expected by someone who is unfamiliar with Chapter 58. For example, when one reads 28 U.S.C. 994(h) and (i), it is clear that, in creating the Commission, Congress was also intent on closely structuring the eventual product of the Commission. Many of the concerns about the Commission and its guidelines issued on 13 April 1987 which I and the Board have heard have been put to rest by referring the concerned individuals to Chapter 58. In many, many situations the concerns were unwittingly directed at the Commission, whereas it was actually the legislation which gave rise to the concerns.

Today I hope to highlight for you a few of the primary thoughts of the FPOA regarding the guidelines. I might start out by emphasizing that we are a professional organization and a politically neutral body.

Equally to be emphasized is that the Federal Probation Service is historically and by design a relatively low key, and very accomodating, body stressing service as its raison d'etre. It is also the only component of the federal criminal justice system which regularly and routinely interfaces with all other components. The Federal Probation Service, I do not hesitate to tell you, has a resevoir of expertise and knowledge, in the area of sentencing and related topics, unmatched elsewhere. We have been the sentencing experts in the system and we will remain the sentencing experts in the new guideline system. Please feel free to call on us in the future as you deliberate in these areas.

The basic tasks of a United States Probation Officer have been investigation of the backgrounds of offenders, assessment of the crimes they commit and supervision of these same offenders in the community, pre and post incarceration.

These basic jobs will remain so, in name at least, upon implementation of the sentencing guidelines; however, there will be, at the direction of Congress as set out in detail by the Sentencing Commission, significant shifts in emphasis. The investigatory part of our work will need to be more sophisticated, technical and focused on those areas which will now be the primary determinants of a specific sentence. The supervisory adjunct will lean more to monitoring and surveillance, rather than the "helping person" type of supervision.

It is impossible now to determine exactly how much the guidelines will impact on the work day of probation officers, but we are certain that the guidelines mean more work for us, both quantitatively and qualitatively, i.e., because of the guidelines the presentence investigation phase of the process will take more hours to complete and the level of responsibility placed on probation officers will be increased.

The job description of a United States Probation Officer is undergoing a major revision and will expand to include "mini-magistrate"/administrative law judge/hearing examiner type duties in connection with plea bargaining (Rule 11, FRCP) and the proposed amendments to Rule 32, FRCP.

Let me hasten to add that the abilities of probation staff currently on duty are up to the changes which are rapidly descending upon us; however, several points must be kept in mind by the Congress and others:

A.) for the past 11 years, beginning with the Parole Commission and Reorganization Act of 1976, additional responsibilities have been rather regularly piled on the shoulders of probation staff, particularly in the past 3 years via new and/or amended statutes. Curfew parole or "house arrest" as some call it is as a good example as any as it requires monitoring of prison releasees by probation officers between the hours of 9:00 pm and 6:00 am, in addition to regular duties, and curfew parole is currently being expanded by the Bureau of Prisons and the Parole Commission which has made it available to many more prisoners. We get no overtime compensation. Probation officers routinely conduct hearings and "preliminary interviews" in connection with parole violation proceedings. Probation officers are primarily responsible for gathering and furnishing the data required for federal criminal justice research projects and will be hardest hit by the Sentencing Commission's requirements in this area. "Gramm-Rudman" has us currently at 94% of required staff according to the outdated 1981 Work Measurement Study which predates all of the changes I bring up today and we may dip to 90% because of the "new Gramm-Rudman". Recruitment of new personnel is increasingly difficult as other jurisdictions now offer better pay/benefit packages.

B.) We are concerned that an ex post facto problem is present in the Comprehensive Crime Control Act of 1984 as currently written and that the Congress need consider an amendment to Section 235 providing that the sentencing guidelines apply only to offense behavior occuring after the guidelines take effect.

C.) The probation service, which will be the key element in the new guideline sentencing, needs an intensive training program to ease into the new system with the least amount of difficulty. As we speak +or-40 probation officers are being trained in Dallas, +or-40 were trained in D.C. last week and +or-40, including this officer, will be trained in Denver next week. I will return to my district 48 hours before the guidelines go into effect, unless Congress acts to postpone implementation. I will be training the Judges and other probation officers in my district on 13 November 1987. the U.S. Attorney's staff later in November and the defense bar in December, a schedule that will generally fall to the other +or-120 probation officer trainers, but there are +or-1,700 other probation officers who will not receive additional training until early next year. It must be said here that the Sentencing Commission and the Federal Judicial Center have, in our view, done everything possible regarding appropriate training, but the clock has marched on and, apparently, is about to run out.

D.) There comes a massive tranfer of discretion from sentencing judges to prosecutors when the guidelines kick in and the FPOA is concerned about prosecutorial discretion as, inter alia, it will become tantamount to sentencing in many cases just by picking the charge to lay against an accused This is an area that will need close attention by the Congress and the Sentencing Commission because it is possible that the very disparities which Congress worked so hard to eliminate in the legislation passed 3 years ago could easily creep back in via unstructured, unguided prosecutorial discretion.

E.) We are certain that errors will be made under the new sustem, especially early on and we also anticipate the possibility of grave errors occurring given, if you will allow me, the "rush to judgement" and we are concerned that the opponents, if any, of guideline sentencing may seize on the inaccuracies to offer a frontal attack on the new system itself.

F.) We are ready, willing and more able than any other component of the federal criminal justice system to take on this massive new responsibility, to jump in with both feet, as it were, to get it up and running and begin to work the bugs out (the only true way to know what's going to happen is to do it and revise it as may become necessary), but you should know that the Federal Probation Service is uneasy, not at all comfortable and, in fact, disappointed that more training has not been possible and available to assist not only probation officers but also judges, prosecutors and defenders who, we suggest, are also going to be operating from a deficit position come 1 November 1987.

Finally, I thank the Committee once again for its willingness to hear from the practitioners and I promise you that the Federal Probation Service will respond to the Congressional mandates while hoping that Congress in turn recognizes our legitimate needs for increased remuneration for increased responsibility, expanded staff and other resources such as increased automation.

SENATOR JOSEPH R. BIDEN, JR.

QUESTION FOR TOMMASO RENDINO

1. In your prepared testimony you state that while training of probation officers is underway, 1,700 probation officers will remain untrained into next year.

   a. Exactly what is the status of training for probation officers? Why are so many still untrained?

2. You have pointed out in your testimony that the investigative work of the probation officers will become more "sophisticated and technical". The guidelines are, of course, very sophisticated and technical and will call upon the probation officers to make complex calculations and judgements.

   a. Are you confident that the probation officers are up to the task of interpreting the guidelines and making the kinds of calculations they require?

3. Sentencing, overall, is going to be a more time-consuming process under the guidelines.

   a. Do you have any estimate of the time it will take for probation officers to complete pre-sentence reports under the guidelines?

   b. How will this compare with the time it takes under current law?

4. Many of the calculations involved in the guidelines depend on findings of fact that will have to be made by the court. One proposal is to allow the probation officer to make his calculations of the sentencing level based on his own judgement regarding the facts, and then to have the court hold a hearing to resolve any controversies over those factual issues.

   a. Is that the procedure that you expect will be followed? (If not, What do you expect the procedure to be?)

Senator Leahy's Written Questions to Mr. Tommaso D. Rendino

You stated in your written testimony that approximately 1,700 federal probation officers will not be trained in the use of the new sentencing guidelines until early next year. When will the training of all existing probation officers be completed?

When will the Probation Service be operating at full efficiency in applying the new sentencing guidelines?

Senator Leahy's Written Question to Mr. Tommaso D. Rendino

In your written testimony you stated that staff reductions caused by budget cuts diminished the Federal Probation Service's ability to recruit officers. You also noted that this problem could be exacerbated by the added responsibilities that probation officers will assume under the new sentencing guidelines.

More budget cuts can be expected. Thus, we have to devise non-funding mechanisms to bolster the Probation Service. Can you recommend any non-funding mechanisms that the Congress or the Probation Service can implement to help recruit and retain probation officers, as well as to help them do their jobs more effectively?

FEDERAL PROBATION
OFFICERS ASSOCIATION

National Officers 1987

President	*Vice President*	*Secretary*	*Treasurer*	*Editor-ExOfficio*
Tommaso Rendino	Ralph Ardito	Charles S. Massey	Carol D. Erichsen	Philip J. Bigger
Burlington, VT	Washington, DC	Fayetteville, NC	Grand Rapids, MI	Brooklyn, NY

16 November 1987

Honorable Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

I am responding to the questions submitted by members of the Judiciary Committee via your covering letter dated October 28, 1987 which arrived here in Northern Vermont on November 2, 1987.

The Federal Probation Officers Association (FPOA) once again advises the Committee that it is very grateful for an opportunity to present some of its views.

Particularly since our brother, U.S. Probation Officer, Thomas E. Gahl, was murdered in the line of duty in Indianapolis in September 1986 we in the FPOA have felt the need to be a little less low-key and reticent about having "significant others" know how we, out here on the front lines, feel about certain issues, especially those which impact heavily on our work. We had pretty much settled down and come to accept, as much as possible, the murder, on the steps of the U.S. Courthouse, Laredo, Texas of U.S. Probation Officer Edmundo Ramirez, three days before Christmas, 1978 and then it happened again. We are constantly mindful of the numerous "hazardous duty incidents (assaults, threats, etc.) " which plague our service, year in and year out, but we also know, and accept, that such goes with the turf. On the other hand, having the United States Senate ask for our opinions on matters of mutual concern gives us a very definite lift.

I will now try to answer your questions and those of Senator Leahy in the order in which they were sent to me and, with your indulgence, I will list them rather crisply.

Senator Biden 1: "In your prepared..."

Senator, there was no way to know in advance if Congress would grant a delay in implementation of the sentencing guidelines or would revise the Sentencing Commission's submissions of April 13, 1987. Given that, 1.) potentially millions of tax dollars could have been wasted in training the Federal Probation Service and judges on guidelines that were rejected by Congress or substantially revised by Congress, or 2.) training (should delay have been directed) could more comprehensively have been addressed, i.e., it's not easy to arrange for training of some 2,500 federal judges and probation officers from 94 federal judicial districts encompassing the 50 states, Puerto Rico, the Virgin Islands, Guam and the Northern Marianas.

As a result, the FPOA, in March 1987 proposed to the Sentencing Commission and the Federal Judicial Center that a "cadre of local district experts" be trained so that at least one probation officer for every district be trained by November 1, 1987 to implement the mandates of Congress should there be no delay or no changes. That idea was adopted, and all judicial districts were invited to send at least one probation officer and a district court judge for training. As far as I know, all districts were represented in D.C., Dallas or Denver during the 2nd, 3rd and 4th weeks of October, this year.

Those trained are not designated as "experts" but as "trainers" and have provided or will be providing training to the remaining district judges, probation officers and others in their home districts. In addition, they will serve as resource persons in their districts over the short haul, the so-called "break-in" period, under the new guideline system.

Senator Biden 2: "You have pointed out..."

Senator, I have absolutely no doubts about the abilities of current probation staff to fulfill these new duties under guideline sentencing. We are a very professional service with a high esprit de corps. We do not want to do an inadequate job in this area. In fact, excellence is our watchword; however, because of factors unrelated to our abilities we may have unreasonable demands on our time making it next to impossible to fulfill all of our duties properly, and ask the Senate to consider favorably the requests made in my prepared statement and here.

Senator Biden 3: "Sentencing overall, is going..."

Senator, we can't be precise on this until we get fully into guideline sentencing and beyond the "start-up" or learning phase (perhaps a year, and after we, as a service, have prepared some 40,000 presentence reports under the new system), but recently some of the leading lights in the Probation Service came together and considered your very question. The group's opinion is that it will require one probation officer for every 66 presentence reports under guideline sentencing as opposed to one probation officer for every 97 presentence reports under "old law" cases.

That, sir, is a significant increase in work that can be met with existing staff, if the Congress will tolerate a dramatic cutback in supervision of probationers and prison releasees on the streets of the nation, an eventuality we would strongly protest and which will bring greatly increased risks to the law abiding public and a very foolish price to pay.

Senator Biden 4: "Many of the calculations..."

The short answer, Senator, is "yes." Specifically, we envision 1.) the proposed presentence report (PSR) being made available to the defendant and his/her attorney and the attorney for the government; 2.) objections to come to the Probation Officer (P.O.) who authored the report; 3.) further investigation by the P.O. and a resulting revised presentence report or a statement that the objections are not well taken and the P.O. stands behind his/her original report, plus an addendum to the PSR setting forth those points which remain in controversy, i.e., those specific issues which the sentencing judge must A.) decide are not germane to the sentencing decision; or, B.) which the sentencing judge must decide after an appropriate hearing ("FATICO").

Thank you, Senator Biden, for the opportunity to further inform the Senate. The FPOA will be happy to consult with the Judiciary Committee further as it may determine is appropriate.

Senator Leahy 1: "You stated in your..."

Actually, all probation personnel should have had some training by the end of November, 1987; however, only one or two officers per judicial district will have been intensively trained and this cadre will bear the brunt during the early stages of guideline sentencing. An educated guess is that the field will be basically "adept" at employing the guidelines by about mud season next year, but that the training will continue well beyond that, given that Congress has mandated the most massive and comprehensive change ever in the federal criminal practice.

Senator Leahy 2: "When will the Probation..."

I recall what I stated just before this question and add that "full efficiency" will probably come in a year, after the Probation Service has had an opportunity to process approximately 40,000 actual cases, feel our way around, and get the benefit of judicial input, especially the results of the appeals which are certain to come.

Senator Leahy 3: "In your written..."

Senator, My prepared remarks were designed to advise that recruitment and retention of qualified probation personnel is increasingly difficult primarily because of pay and benefit packages and also because the level of responsibilities as well as the quantity has steadily risen, i.e., more responsibility at a higher level, plus a lengthened required work week for less pay. Why become a U.S. Probation Officer in New York or California, for instance, when you can become a state parole -- no probation or pretrial services duties -- officer with $32 to 34,000 annual salary, plus a state automobile? The Federal Probation Service was for decades the "Cadillac of Corrections". We are rapidly becoming the "Pinto of the Potomac".

We do not believe, especially with the Congressional impetus in the area of law enforcement, that a federal agency with a strong law enforcement component such as is the U.S. Probation Service, should be hamstrung for lack of a mere pittance. Congress has responded to the needs of the Bureau of Prisons (an executive branch agency, we are judicial) with the increased emphasis or criminal sanctions. It should likewise appropriately fund the Probation Service.

When Congress passed the Comprehensive Crime Control Act (CCCA) of 1984 and the Anti-Drug Abuse Act of 1986, it was aware of the probable increase in the federal prison population and Congress has committed itself to meeting those needs. The presentence reports of the Probation Service are the most key documents for the federal criminal justice system in properly classifying, programming and monitoring offenders convicted in the U.S. District Courts. The entire system, not to mention the community at large, will suffer if 1.) poorer quality presentence reports become necessary because Congress chooses to underfund the Probation Service; or, 2.) less rigorous supervision of court or prison releasees results for the same reason; or 3.) both happen because of insufficient funding.

Thank you, Senator Leahy, for your interest in fleshing out some of these issues.

Sincerely,

Tommaso D. Rendino

Tommaso D. Rendino
President

Senator **Kennedy**. Well, I want to thank both of you. I think your comments have been very helpful, very constructive and useful, and we want to thank you for bringing these matters to our attention. We will certainly give them very careful consideration.

We want to thank both of you, and thank our other witnesses. I think it has been a very informative, helpful and useful hearing for the members of the Committee, and for the Senate, and the Full Committee now stands in recess.

[The committee adjourned at 12:56 p.m., subject to the call of the Chair.]

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
U.S. POST OFFICE & COURT HOUSE
P.O. BOX 3684
LITTLE ROCK, ARKANSAS 72203

G. THOMAS EISELE
CHIEF JUDGE

July 8, 1987

TO: All Eighth Circuit Judges

RE: Constitutional Questions Re: United States Sentencing Commission

Dear Judges:

In my past correspondence concerning the sentencing guidelines I have referred to the fact that many scholars are raising serious questions as to the constitutionality of the Sentencing Commission. I have not wanted to dwell on those potential infirmities because my real objections are far more fundamental. In other words, it may be possible that the Congress could enact new legislation which might obviate these constitutional problems and still leave us with the basic defects that I have dealt with, and will deal with, in other memoranda. Nevertheless, I want each of you to be aware of some of the problems inherent in the present law.

Mr. Lewis J. Liman has published in the May, 1987, issue of the Yale Law Journal an interesting article entitled, "The Constitutional Infirmities of the United States Sentencing Commission." He notes and discusses the separation of powers and the non-delegation issues. The following quotations from Mr. Liman's article provide us with a feel for the problems as he sees it:

> The Constitution's separation of powers into three branches provides "structural protections against abuse of power" that do not turn upon the momentary beneficience of particular officers. The Sentencing Commission imperils the liberty protected by the separation of powers not only because it vests the executive branch with the judicial and legislative power of determining sentences, but also because the President obtains the power to appoint and remove judges to a non-judicial body. Before the legal challenges to the Commission's guidelines create havoc in federal sentencing, and the Parole Commission is divested of authority to release persons sentenced under the guidelines, Congress should restructure the Commission and eliminate the binding effects of its guidelines.

* * *

> The Sentencing Commission intrudes into an area where decisions must be made through the deliberative processes of Congress. Every one of its guidelines, all of which go into effect unless Congress passes and the President signs an act to the contrary, will reflect the type of substantive moral judgment that has traditionally been reserved for Congress.

* * *

> As with the United States Parole Commission, Congress created the Sentencing Commission as an independent agency. Despite this effort to insulate the Commission from constitutional challenge, however, neither the Commission's "independent" status nor its formal placement in the judiciary saves it from constitutional attack. Independent status, whatever its current viability in other respects, is irrelevant to nondelegation analysis. Moreover, though judiciary branch status might be relevant to a nondelegation challenge, the Court has held that statutory designation is not dispositive in a separation of powers inquiry. In light of the Commission's power to promulgate regulations and the President's authority over its members, the majority of whom have no connection to the judiciary other than their service on the Commission, to claim that the Commission is in the judiciary rather than the executive branch is simply not colorable.

If this analysis is sound, we have an executive branch agency establishing mandatory sentencing which judges are required to adhere to. Finally, Mr. Liman points out:

> The provision that the guidelines remain before Congress for 180 days before they take effect does not save the Commission. Congressional oversight does not turn administratively promulgated rules into legislation or cure a delegation that is too broad.

Mr. Liman then turns to the problems created by having judicial members on the commission:

> Congress' effort to cloak the Commission's activities in judicial robes, simply by placing judges on it, constitutes a deeper flaw in its constitutionality. The judiciary in our tripartite system is limited to deciding "cases" and "controversies" and exercising those non-adjudicative administrative powers that are essential to the running of the courts. The authority that

> the Commission possesses to implement final binding action on a matter outside the peculiar interests of the judiciary, and its mixed composition of judges and other presidential appointees renders the Commission unconstitutional.

He then discusses the "case and controversies requirement," noting Alexander Hamilton's statement that "the interpretation of the laws is the proper and regular province of the courts" and "liberty would have everything to fear from [the judiciary's] union with either of the other departments."

The vice implicated by article III judges participating on the Sentencing Commission is identified by Liman as follows:

> These twin concepts - that judges may not enter into a formal working relationship with members of the other branches or exercise rulemaking power on matters that are not ancillary to the judicial process - give content to the Supreme Court's dicta that "executive or administrative duties of a nonjudicial nature may not be imposed on [article III] judges. Under these principles, the Sentencing Commission violates the separation of powers.
>
> The union of the judiciary and the executive that the Sentencing Commission creates gives the executive a power considered among the more pernicious: the power to control the responsibilities of sitting judges. * * * Under the Sentencing Reform Act, however, the executive branch chooses the judges who then are excused from their responsibilities to reside in their districts and are required to serve full-time on the Commission. Not only does the provision that the President appoint at least three judges to the Commission provide him a vehicle for virtually the first time through which he can determine the assignments of sitting judges, but the composition of the commission is such that the four non-judicial presidential appointees at any one time may be able to determine whether the judges on the Commission should be summoned to Washington or allowed to stay in their courtrooms.
>
> Moreover, the Sentencing Commission effects a permanent collaborative relationship between the judiciary and executive that violates the norm of judicial independence. Service on the Commission is not merely transient. Although the statutory requirement that at least three article III judges serve on the Commission may not be constitutionally dispositive, it is indicative of the permanent association of the judiciary with the executive and legislative branches that the Sentencing

> Commission represents. Like other public offices, Commission membership embraces concepts of tenure, duration, emoluments and duties, and involves the exercise of "significant authority [under] the laws of the United States." The judges on the Commission will exercise substantial rulemaking authority on a full-time basis, for a period of six years, and, in the case of a district judge, will receive an extra stipend. Indeed, Congress understood that the Commissioners were officers of the United States when it decided to place the appointment power with the President.

Then Liman makes the point that even if the Commission had been constituted in and under the control of the judiciary, there would be serious constitutional problems:

> Finally, the nature of the Commission's authority is such that it might well be unconstitutional even if it were solely within the judiciary. The type of legislative rulemaking that the Sentencing Commission will engage in both involves the judiciary in the decision of matters of broad public policy outside the confines of a specific case and breaks with the separation of powers in allowing the legislators who promulgated rules to also apply them. * * * The guidelines that the federal Sentencing Commission will promulgate must of course be construed and applied by the district courts in every sentencing and will likely be frequently challenged on constitutional and statutory grounds in the courts of appeals. Judges on the Commission will thus necessarily review their concurrent actions as legislators . . . .

The above summary is provided for your convenience only. The entire article can be found in 96 Yale L.J. 1363 (1987). I think it is important that we understand these issues, but I also think it is important that we do not dwell on them, because, in my view, such concerns are diversionary. We must focus our objections upon the fundamental errors of the proposed guidelines concept and not upon certain constitutional problems which might be cured.

However, once again the point should be made: Both the proponents and the opponents of the proposed guidelines system can find common ground here, i.e., some change in the law must be made. The proponents will be urging, more or less, "technical" amendments to the law, whereas the opponents, I hope, will be urging total rejection. The shared view would be, however, that Congress must take some action; it cannot simply sit on its hands and let the guidelines go into effect unless it is willing for that system to "create havoc" in federal sentencing.

I hope to get to you my views on "disparity" soon, and follow that with a summary of other problems created by this radical proposal.

With best personal regards, I am

Sincerely yours,

Tom

G. Thomas Eisele

Some Reasons for Opposing The Proposed Sentencing Guidelines

(G. Thomas Eisele)

August 5, 1987

1. The criminal justice system envisaged by the Guidelines proposal is contrary to, and in direct conflict with, our long held and cherished, constitutionally-based, concepts of criminal justice. That proposal, if it goes into effect, will act as a threat to the rights and freedoms of individual citizens and make them ever more vulnerable to Executive Branch manipulation and control. It is alien in concept and foreign to the values long held dear in this Nation.
2. The Constitution purports to place the judicial power of the United States in Article III Courts. The exercise of sentencing discretion is, and has always been considered, a _judicial_ power and function. The new Guidelines System effectively takes the judicial sentencing power out of the hands of the judges and places it in the hands of Executive Branch officials in our Government. That system will compromise or destroy judicial power and judicial independence in this most sensitive of areas.
3. The Sentencing Guideline system requires or permits the following practices:
    a. The characterization of certain acts, conduct, and states of mind as crimes, for all intents and purposes, without the benefit of the informed legislative decision of the Congress of the United States and the establishment of

Besides the due process issues, the guidelines directly suggest constitutional issues in reference to separation of powers; improper delegation of legislative power; improper limitation on judicial power and interference with judicial independence.

4. The Sentencing Guidelines system will not result in fewer disparate sentences, but more, while effectively hiding this disparity from public view. The disparity that presently exists is happenstantial. The guidelines will institutionalize disparity and make it a permanent feature of our criminal justice system. This should be apparent when one understands that the plea-bargain system continues in even more virulent form under the Guidelines. And the Guidelines system arms the prosecutors with immense new coercive powers which can be used to force defendants (perhaps even innocent defendants) into accepting plea bargains. Wheeling and dealing will become the common substitute for the just disposition of criminal cases. The coercive - is it too strong to say "extortionate" - power given to the prosecutor arises out of the threat implied by the Guidelines system: "Either make a deal or be sentenced according to the guidelines." The result will be that very few people will risk going to trial because the price and risk of insisting upon one's rights (and, indeed, to one's day in court) will be too high. The main disparity will then be between the sentences of those who have the temerity to plead not guilty and are convicted (and those who plead

guilty without a prior agreement with the prosecutor) on the one hand and those who make a deal and are sentenced outside and below the Guidelines. This latter privileged group will have its own sets of disparate sentences, the most obvious reflecting the disparity in the quality of the attorneys representing the defendant on the one hand and the government on the other.

5. The new Guidelines system will have a dramatically adverse workload impact upon the entire federal judiciary, the extent of which is only now becoming apparent through studies made individually by federal judges around the country. The imposition of sentences, the satellite evidentiary hearings required, the appeals and potential re-hearings, will obviously consume more time, in many instances, than the trial itself. If justice were enhanced, such costs would not seem unreasonable. But if the ends of justice are disserved, as they are by this system, those costs become intolerable.
6. By removing the power from judges to exercise their own judgments when imposing sentences, the Guidelines system will also tend to relieve those judges of any sense of personal responsibility for such sentences. Many judges presently literally hate their sentencing responsibilities because of the tremendous intellectual and emotional toll they take on those judges. But all judges, whether they like, dislike or just tolerate their sentencing responsibilities, nevertheless take those responsibilities ever so seriously. If the Guidelines system goes into effect, the judges' reactions

will be, "Since the Congress wants others to make the really important sentencing decisions, let them make those decisions. After the prosecutor and the defense attorney make their agreements and stipulations on the charge(s) and the sentencing facts, why should I bother with it? The probation office can verify the calculations and tell me what to do when I get in the courtroom." Busy judges will not likely feel inclined to investigate the parties' handling of the matter. Nor do they have adequate resources to investigate to see if the charges filed are appropriate or if the facts stipulated adequately reflect the true sentencing factors involved in the crime(s). Judges, under the Guidelines system are simply used in an effort to give some dignity to a very undignified, mechanistic and demeaning process.

7. To the extent that conscientious judges fight the system in an attempt to police plea bargains, a new dichotomy of disparate sentences will result, i.e., the disparity between the sentences of judges who investigate and look behind plea bargains and the sentences of judges who accept and go along with such plea bargains.
8. The Guidelines for all practical purposes have eliminated probation as a possible sentence in felony cases.
9. Even though egregiously unfair, harsh and disparate sentences will result from the use of the Guidelines, there will be no escape or relief valve to ameliorate the effect thereof since the Parole Commission and its powers will be done away

with. Except for modest "good time" credits, the sentence imposed will be the sentence served.

10. The Guidelines system will decrease honesty and rationality in the sentencing process.

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

October 7, 1987

Hon. Joseph Biden
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Hon. Peter Rodino
Chairman, Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

RE: FEDERAL SENTENCING GUIDELINES

Dear Senator Biden and Congressman Rodino:

My purpose in writing is to express disappointment in the Sentencing Guidelines and Policy Statements that the United States Sentencing Commission has submitted to Congress. The Commission, in my view, has failed to do the job that Congress directed it to do. Despite the defects of the current federal sentencing system, this system remains preferable to the system that the guidelines would create. I hope that Congress will not allow the guidelines to go into effect (as they will automatically if Congress fails to act before November).

This statement discusses four deficiencies of the Commission's guidelines -- their overuse of imprisonment, their contribution to an increased federal prison population, their effective transfer of sentencing discretion from judges and parole authorities to prosecutors, and the crudity of their sentencing standards -- standards that neglect offense and offender characteristics that virtually all sentencing judges have considered important.

* * * * * * * *

Many American jurisdictions currently are experimenting extensively with noncustodial sanctions, and commentators whose views of criminal justice differ as substantially as those of Edward Kennedy and Edwin Meese have favored a broader use of these sanctions. The federal courts, which benefit from a well-trained, adequately funded probation service, ought to be in the forefront of the development of effective nonincarcerative punishments. Nevertheless, the chart that follows, drawn from the Sentencing Commission's Supplementary Report to Congress, indicates that the use of alternatives to imprisonment will decline very substantially under the guidelines:

Offense Type	Under Current Practice	Under Guidelines
Person offenses	31.4%	14.6%
Robbery	18.0%	3.0%
Burglary	64.0%	43.0%
Property Offenses	60.1%	33.1%
Drugs	20.8%	5.1%
Fraud	59.0%	24.0%
Income taxes	57.0%	3.0%
Firearms	37.0%	9.0%
Immigration	41.0%	30.0%

Percentage of Defendants Receiving Probation

This chart reports only the percentage of offenders sentenced to what the Sentencing Commission calls "straight" probation; it does not include sentences to both probation and imprisonment.

The foregoing figures, suggesting a dramatic increase in the use of incarcerative sanctions, do not rest on the assumption that every future offender will receive the sentence that the guidelines appear to prescribe. The Commission has assumed that only a small minority of future offenders -- the 15 percent convicted at trial -- will be sentenced as severely as the guidelines appear to mandate. Although the guidelines authorize only a "two-level" reduction in sentence (in most cases about a 20 percent reduction) when a defendant "affirmatively accepts responsibility" for his or her crime, the Commission's predictions assume that defendants who plead guilty will receive discounts of 30 percent from their probable post-trial sentences (the same "percentage reduction" that guilty-plea defendants currently receive). This assumption underscores the Commission's recognition that its guidelines will not significantly limit plea bargaining. If judges and prosecutors were to apply the guidelines as written, the reduction in the use of probation would be more striking than the chart suggests.

The Commission has limited not only the use of probation as an alternative to imprisonment but also the use of fines. Although the Commission has provided for the imposition of fines "in all cases," it has authorized these fines only as a supplement to imprisonment and not as an alternative to it. The guidelines thus effectively mark the end of the fine as an independent sanction. The Commission has taken this action without explanation -- at a time when commentators of varying persuasions have concluded that fines often can be as effective as imprisonment and that, when they are, they are far more cost-efficient.

The Sentencing Reform Act of 1984 provides, "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." A Commission whose guidelines would reduce the proportion of fraud offenders who receive probation from 59 to 24 percent, the proportion of property offenders who receive probation from 60 to 33 percent, and the proportion of tax offenders who receive probation from 57 to 3 percent seems not to have paid much heed to this directive.

* * * * * * * *

The Commission's Supplementary Report declares, "To a large extent, the reduction in straight probation results from the reduction of disparity in sentence length, rather than from an increase in average sentence length." Nevertheless, the Commission does anticipate a great increase in average sentence length. It has attributed this increase primarily to the Anti-Drug Abuse Act of 1986 and to the Sentencing Reform Act's directive to set guideline sentences at or near the statutory maximums when cases involve career offenders.[1] Again, the

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[1] The Commission has asserted that, once drug cases and career offenders cases are set aside, its guidelines' sentences are "not significantly longer" than those currently imposed. *E.g.*, Testimony of Commissioner Stephen Breyer before the House Judiciary Subcommittee on Criminal Justice, July 23, 1987. The Commission, however, has not released data in its possession that would permit an independent evaluation of this claim.

The Commission's research staff has determined the amount of time that offenders sentenced in 1985 will serve in prison, and it also has determined the amount of time that these offenders would have served had the guidelines been in effect. The appropriate way to measure the sentencing effects of the guidelines in *non*-drug, *non*-career offenders cases would be to exclude drug *and* career offenders cases from the Commission's statistical base. Then the Commission could determine the aggregate number of "person years" that offenders sentenced in 1985 in all other cases will actually serve and the number of "person years" that these offenders would have been required to serve had the guidelines been in effect.

I requested this readily ascertainable information from the Commission on July 24 and reiterated my request in a lengthy letter to the Commission's research director on August 21. Congressman John Conyers, the Chairman of the House Criminal Justice Subcommittee, also has requested this information in a letter to the Commission's research director. The director, however, has not responded to these requests. In answer to a telephone inquiry, the director recently reported that he will be too busy to supply the requested data before the deadline for Congressional action.

Commission's projections rest on the assumption that the guidelines and other sentencing provisions will apply as written only to defendants convicted at trial, and that defendants who plead guilty will be sentenced much less severely. The projected sentence increases noted in the following chart would be greater in the absence of this assumption.

	Average Time Served (Imprisonment -- in Months)	
	Current Practice	Guidelines
Offense type		
Robbery	44.8	75.4
Person	37.7	75.2
Drugs	23.1	57.7
Firearms	14.1	15.2
Burglary	7.7	16.5
Fraud	7.0	8.0
Property	6.8	6.5
Immigration	5.7	5.2
Income tax	5.5	11.9

The human costs of unnecessary imprisonment are of greater concern than the economic costs, but the fiscal impact of the Commission's proposals do merit serious attention. Even under what the Commission calls its "low growth scenario," the federal prison population will more than double within the next 10 years -- from 42,000 at present to 92,000 in 1997. The Commission attributes most of the projected increase to an increase in the number of federal prosecutions, to the impact of the sentencing provisions of the Anti-Drug Abuse Act of 1986, and to the impact of the Sentencing Reform Act's directive concerning guidelines sentences for career criminals. Using as its "base" the vastly

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Data earlier supplied by the Commission do reveal that in *non*-drug cases the guidelines *without* the career offenders provisions would have increased the aggregate amount of imprisonment by 16 percent. This figure undoubtedly *understates* the effect of the guidelines on imprisonment; if career offenders cases as well as drug cases had been excluded from the statistical "base," the percentage impact of the guidelines would have been higher. The 16 percent figure, in other words, excludes the *effects* of the career offenders provisions but nevertheless *leaves* the earlier sentences imposed in career offenders cases as part of the "base" from which the guidelines effect is calculated. Although the Commission has not revealed how much, the guidelines plainly would increase substantially the aggregate amount of imprisonment in *non*-drug, *non*-career offenders cases. As this letter *will* explain, they would do so despite the fact that the Commission expects other developments to produce a crisis of major proportions in the federal prison population. Any claim that the guidelines merely reduce disparity and that they do not significantly increase the length of the average federal sentence should be viewed with extreme skepticism.

increased prison population that it expects these developments to trigger, the Commission has concluded, "There is no scenario under which the guidelines have more than a 10 percent impact on prison population."

A large projected "base" can make a significant increase in prison population appear relatively small, and the Anti-Drug Abuse Act and the other developments emphasized by the Commission may not have the effects that the Commission expects. When prisons are overcrowded, for example, federal prosecutors may respond to the sentencing provisions of the Anti-Drug Abuse Act, not by increasing the number of drug prosecutions as the Commission anticipates, but by leaving a greater number of drug prosecutions to the states.

Estimating the effect of sentencing guidelines on prison populations is extraordinarily difficult, however. I offer only the following conclusion, one that seems safe and conservative: Under each of its alternative "scenarios," the Commission expects a massive increase in the number of federal prisoners. It nevertheless has taken actions that will aggravate rather than ameliorate the expected crisis. These actions appear to contravene another admonition of the Sentencing Reform Act: "The sentencing guidelines . . . shall be formulated to minimize the likelihood that Federal prison population will exceed the capacity of the Federal prisons."

* * * * * *

The Sentencing Reform Act directs the Commission to promulgate policy statements concerning the acceptance or rejection of plea agreements by federal judges, and the legislative history of this provision reveals Congress's concern that prosecutorial plea bargaining might undermine the objectives of the guidelines. Nevertheless, the guidelines declare, "The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea negotiation practices."

The Commission's assessment of its guidelines' plea bargaining provisions may be incorrect. These provisions, cast in vague and ambiguous language, require (among other things) a determination whether the charges remaining after a plea agreement "adequately" reflect the offender's conduct. Some judges might read these provisions to mandate a close review of plea agreements to ensure that they do not lead to sentences substantially different from those prescribed by the guidelines. Other judges (like the Commission) might assume that plea negotiation remains essentially unregulated. Disparity in sentencing practices might result from differing interpretations of the guidelines.[2] Nevertheless, the Commission's judgment that its guidelines will not significantly restrain current plea bargaining practices does seem plausible.

If this judgment were to prove correct, the effects would not all be unfortunate. Unrestrained plea bargaining might well ameliorate the defects of the guidelines noted earlier in this letter. Bargaining by prosecutors could cause the guidelines to yield a less severe reduction in the use of nonincarcerative sanctions and a smaller growth in the population of federal prisons than the Commission has anticipated. If plea bargaining did have these effects, however, the reason would be simply that the Commission had allowed plea bargaining to undercut its guidelines. These effects would materialize only if the reduction in punishment awarded to defendants who pleaded guilty became even greater than the "30 percent off" that the Commission expects these defendants to receive. In my view, effectively transfering sentencing discretion from judges and parole authorities to prosecutors (and at the same time increasing the sentence disparity between guilty-plea and trial defendants) would not be progress; to the contrary, it would be a perverse and regrettable development.

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[2] The guidelines' provisions concerning "sentence" (rather than "charge") bargaining are also subject to differing interpretations. These provisions declare that a court may accept a bargained sentence recommendation so long as "the recommended sentence is within the applicable guideline range or the recommended sentence departs from the applicable guideline range for justifiable reasons." The Commission and other observers apparently interpret this language to authorize a judge to accept a bargained sentence recommendation whenever the judge, relying only on his or her best judgment, concludes that the recommended sentence is "justifiable."

The Sentencing Reform Act of 1984, however, does not afford federal judges the power to determine for themselves what reasons for departing from the guidelines are "justifiable." The Act authorizes a departure from the guidelines only when "an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and that should result in a sentence different from that described." A judge might (indeed he or she should) interpret the phrase "justifiable reasons" to encompass only those reasons that the Sentencing Reform Act makes justifiable. On this interpretation, even after a "sentence recommendation agreement," a judge could depart from the guidelines only when he or she discovered an aggravating or mitigating circumstance inadequately considered by the Commission, a circumstance that should lead to a sentence other than the guidelines sentence. In other words, the judge should depart from the guidelines following a sentence recommendation agreement only when he or she would depart from the guidelines even in the absence of the agreement. Unfortunately, neither the Commission nor others who have commented on its guidelines appear to have considered the relevant statutory provision.

When guidelines mandate imprisonment but a prosecutor concludes that the defendant merits probation, plea bargaining may provide the only means of imposing the sentence that the prosecutor (and frequently the trial judge) considers just. Indeed, a system of sentencing guidelines that on its face prescribes severe sentences but that leaves plea bargaining unconstrained creates a prosecutor's paradise. In such a system, sentencing guidelines masquerade as the Sentencing Commission's determination of appropriate penalties. In reality, the guidelines are merely bargaining weapons -- armaments that enable prosecutors, not the Sentencing Commission, to determine sentences in the overwhelming majority of cases. In operation, the guidelines rarely set sentences; they merely augment the power of prosecutors to do so.

Police interrogation manuals have described the "good-cop, bad-cop" stragatem for obtaining confessions. After a police officer acting the role of a "bad cop" has threatened a suspect with harsh treatment, another officer appears as a sympathetic "good cop" and agrees to save the suspect from the actions that the "bad cop" has threatened. The "good cop" offers to help the suspect, however, only if the suspect cooperates. Sentencing guidelines that appear to mandate "tough" sentences but that leave plea bargaining unconstrained are likely to have a similar effect. The Sentencing Commission plays the role of the "bad cop," threatening the accused with harsh treatment. The prosecutor, the "good cop," then agrees to protect the defendant, but only if he or she abandons the right to trial.

* * * * * * * *

A more specific illustration of the plea bargaining leverage that the guidelines provide may illustrate another defect of the guidelines as well -- the crudity of their sentencing standards. The Commission's guidelines begin by prescribing sentences for homicide cases. Although homicide prosecutions in the federal courts are relatively rare, this initial section of the guidelines provides a clear example of how the guidelines are likely to operate -- a more easily understood example than one in which, for example, RICO charges are transformed through plea bargaining into Hobbs Act charges. The guidelines direct federal courts to impose determinate sentences of imprisonment within the following ranges when first-offenders are convicted of homicide:

	ABSENT ANY "ADJUSTMENTS" OR "DEPARTURES"	FOLLOWING AN "AFFIRMATIVE ACCEPTANCE OF RESPONSIBILITY"
First degree murder	life without parole	324 - 405 months
Second degree murder	135 - 168 months	108 - 135 months
Voluntary manslaughter	57 - 71 months	46 - 57 months
Involuntary manslaughter	15 - 21 months if the conduct was reckless; 6 - 12 months if the conduct was negligent	10 - 16 months if the conduct was reckless; 2 - 8 months if the conduct was negligent

Under the guidelines, a prosecutor who offers to reduce a charge from one grade of homicide to another (say, from first-degree to second-degree murder or from second-degree murder to manslaughter) apparently can provide an enormous reduction in the defendant's sentence. Typically, the prosecutor can offer a sentence about one-third as severe as the sentence that the defendant would have received if convicted of the greater charge at trial. For example, the basic guidelines sentence for a first-offender convicted of first-degree murder is life without parole, but a defendant charged with first degree murder who pleads guilty to second-degree murder apparently can expect to be sentenced to about ten years' imprisonment.[3]

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[3] This conclusion rests on the assumption that the defendant will receive a sentencing "adjustment" or "credit" for his or her "affirmative acceptance of responsibility" following a guilty plea to second-degree murder. The Commission's Supplementary Report declares, however, "It is the Commission's expectation that this adjustment [for an "affirmative acceptance of responsibility"] will be applied primarily . . . in cases that involve guilty pleas without a charge reduction or sentencing agreement."

The reason for the Commission's expectation is unclear. In the case suggested above, the defendant has "affirmatively accepted responsibility" for the only crime of which he or she has been convicted, second-degree murder. Perhaps, despite the Commission's disclaimers, the "adjustment" that it has provided for an "affirmative acceptance of responsibility" is simply a disguised "discount" for saving the government the expenses of a trial. The Commission may believe that a defendant who has been "paid" for conferring this benefit should not be permitted to "double-bill" by obtaining a concession from the court as well as

The prosecutor's bargaining power under the guidelines results in part from the Commission's failure to differentiate among offenses and offenders in any but the crudest terms. The commentary to the guidelines recognizes that first-degree murder includes many cases in which defendants have not killed intentionally or knowingly. It suggests that "departures" from the guidelines may be appropriate in these cases of unintentional killing, adding that "the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate." The Commission, in other words, simply has not provided meaningful guidelines for cases of unintentional first-degree murder. The commentary further declares, "The Commission has concluded that, in the absence of capital punishment, life imprisonment is the appropriate punishment for . . . 'willful, deliberate, malicious, and premeditated killing.'"

A "willful, deliberate, malicious, and premeditated killing" may be a killing by a hired "hit-man," by a political terrorist, or by a robber who has decided not to leave a witness to his or

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the prosecutor. Alternatively, the Commission may believe that all defendants who plead guilty to reduced charges of second-degree murder are in fact guilty of first-degree murder so that they have not "affirmatively accepted responsibility" for their "real" crimes. In any event, accepting the Commission's assumption would not significantly alter the conclusion suggested above. A reduction to a charge of second-degree murder would lead to a sentence of about twelve-and-one-half years rather than ten -- again a dramatic reduction from the threatened guidelines sentence of life without parole.

Similarly, a defendant charged with second-degree murder apparently could reduce his or her expected sentence from about twelve-and-one-half years to about four-and-one-half years if the prosecutor permitted him or her to plead guilty to the "next most serious homicide offense," voluntary manslaughter. A defendant charged with voluntary manslaughter could reduce his or her expected sentence from about five years if convicted at trial to about one year if permitted to plead guilty to the "next most serious offense," involuntary manslaugher.

Under the guidelines, similar reductions in sentence occur in many offense categories when charges are lowered one "notch." Ironically, smaller reductions might occur in some offense categories if bargaining prosecutors and defense attorneys could "stipulate" that an offender had stolen a smaller amount of property than he or she had stolen in fact or that the offender had possessed a smaller quantity of drugs than law enforcement officers had discovered on his or her person. The guidelines, however, clearly preclude fictional or misleading "stipulations"; they do not clearly preclude fictional or misleading charge reductions.

her crime. It also may be a killing by a battered spouse not currently threatened with imminent harm; a killing by a lover who has been jilted; a killing during a barroom quarrel; or even the mercy killing of a terminally ill relative. One might have expected a Commission charged with drafting sentencing guidelines for homicide cases to have differentiated among these different offenses. When Congress provided, "If the sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months," it surely expected the Sentencing Commission to draw finer lines than those provided by the offense categories of the federal criminal code.

For the most part, the Commission has not drawn these finer lines. It has relied primarily on statutory offense categories, sometimes refining these categories on the basis of the harm inflicted (for example, the value of the property that an offender has stolen or the quantity of drugs that the offender has sold). The guidelines reveal very little sense that just sentences depend upon an assessment of the personal characteristics of offenders and of the situations in which they have acted as well as upon an assessment of the social harm produced.

Consider, then, an offender who had led a law abiding life until one day when a person whom he or she loved abandoned him or her for someone else. This offender now has been charged with first degree murder for killing his or her former lover in a state of grief and anger during a confrontation in which the victim recounted the offender's perceived failings. Unless the conduct that provoked the killing could be described as "wrongful," the Commission has not expressly invited any "departure" from its guidelines. The guidelines say only, "Life without parole." Nevertheless, a prosecutor who believed that so severe a sentence should be reserved for a criminal who posed a serious, continuing threat to society might offer to permit the defendant to plead guilty to second-degree murder.

In evaluating the prosecutor's offer, a good defense attorney would consider the likelihood that a judge would impose a sentence other than the guidelines sentence even were the offender convicted of first-degree murder at trial. The Sentencing Reform Act authorizes such a "departure" when a judge "finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."

A trial judge might conclude that, because the Sentencing Commission failed to consider -- either adequately or at all -- any mitigating circumstance in homicide cases, its guidelines should not constrain his or her sentencing discretion. The defense attorney, however, probably could not anticipate so bold a ruling. Even were the attorney prepared to gamble that some "departure" from the guidelines was likely, he or she might not anticipate a great departure. A first-degree murder sentence as low as the guidelines sentence for second-degree murder, for example, might prompt an appeal that the judge might wish to avoid. The attorney might conclude that his or her only choice was to accept the prosecutor's offer -- in effect, the prosecutor's determination of sentence. The risk of "life without parole" or of something close to it might seem too great to run. The attorney might reach this conclusion although a "manslaughter" sentence appeared more appropriate in the circumstances of the case and although the attorney believed that a jury might convict the offender only of this lesser crime at trial.

One cannot be certain what effect the guidelines would have on the determination of sentence in this far from abberational case; but whatever the guidelines' effect, it seems likely to prove unfortunate. When the best that can be said of sentencing guidelines is that judges may "depart," that prosecutors may "bargain," and that the guidelines therefore may not significantly change current practice, those guidelines do not merit adoption.

* * * * * * * *

With the implementation of federal sentencing guidelines, the United States Parole Commission will disappear. This agency has minimized the effects of both judicial and prosecutorial sentencing disparities by applying uniform standards for release on parole throughout the nation. Insofar as the effective operation of the Commission's guidelines would depend on the willingness of judges to "depart," the guidelines might not greatly limit judicial sentencing disparity. Sentence review by a dozen United States Courts of Appeals, moreover, would seem substantially less likely to reduce disparity than the application of uniform parole guidelines by a single national agency.[4]

More importantly, the sentencing guidelines provide no significant control of de facto sentencing decisions by prosecutors, and the Sentencing Reform Act authorizes no control of these informal prosecutorial decisions by the United States Courts of Appeals. With the implementation of the guidelines, the corrective that the Parole Commission has provided for disparate prosecutorial practices would disappear, and no substitute would be provided. On balance, the replacement of the current parole guidelines with the Commission's sentencing guidelines might aggravate rather than minimize sentence disparity. Rather than sacrifice justice in the individual case for the sake of certainty in sentencing, the guidelines might yield both injustice and uncertainty.

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[4] In practice, appellate courts are likely to afford substantial deference to the sentencing determinations of trial judges. Moreover, appellate review is a far more burdensome, cumbersome and expensive means of reducing disparity than the application of parole release guidelines by an administrative agency.

The Parole Commission, which determines only the date of a prisoner's release, obviously has been unable to reduce disparty in the most important component of the sentencing decision -- the choice between prison and probation. The Sentencing Commission's guidelines might reduce disparity in this phase of the sentencing process -- but only by mandating a far more common use of imprisonment. Disparity might be preferable to the unreflective use of imprisonment as the "standard" criminal punishment. Moreover, the guidelines seem more likely to transfer broad discretion to impose nonincarcerative punishments from judges to prosecutors than to limit this discretion substantially. The guidelines might yield certainty in sentencing only for the minority of offenders bold enough (or foolhardy enough) to exercise the right to trial.

The sentencing guidelines provide a 258-box sentencing grid. Locating a case within the appropriate box in this grid (as well as resolving such additional issues as whether multiple sentences should run concurrently or consecutively) would require courts to resolve innumerable issues of guidelines interpretation, many of them far from clear.[5] Appellate review of the resolution of these issues would be likely to increase substantially the already heavy workloads of the United States Courts of Appeals. Moreover, the guidelines might also promote complex trials as some prosecutors attempted to maximize sentences by charging offenses that would trigger consecutive sentences, by establishing the aggregate dollar amount of the bribes that a corrupt judge had taken, and the like. In light of the substantial freedom of judges to depart from the guidelines and in light of the Commission's failure to restrain plea bargaining, the cumbersome mechanism created by the guidelines would seem unlikely to yield a gain in certainty that would warrant its obvious costs.

The guidelines submitted by the United States Sentencing Commission are a backward rather than a forward step in the search for just, certain, and effective criminal punishments. Congress should prevent their implementation.

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[5] See United States v. Reich, 55 U.S.L.W. 2691, 41 CRIM. L. REP. 2190 (S.D.N.Y. May 20, 1987) (Sweet, J.).

Sincerely yours,

Albert W. Alschuler
Professor of Law

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

October 14, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

Enclosed is my statement for inclusion in the record of your October 22 hearings on the sentencing guidelines.

I regret that a conflicting assignment from my Court has made it impossible for me to accept your kind invitation to testify in person.

Sincerely,

Jon O. Newman
United States Circuit Judge

Encl.

cc: w/encl.
Honorable Arlen Specter

Statement of
Judge Jon O. Newman
Submitted to the Committee on the Judiciary,
United States Senate,
Hearings on Sentencing Guidelines
October 22, 1987

My name is Jon O. Newman. I have served as a judge of the United States Court of Appeals for the Second Circuit since 1979 and before that served as a United States District Judge for the District of Connecticut for seven and one-half years. Before that I served as United States Attorney in Connecticut for five years. I appreciate the opportunity to submit this statement in lieu of testimony, which I am unable to present because the date of this hearing coincides with the long-scheduled date of the workshop I am chairing for all circuit and district judges in the Second Circuit to prepare for implementation of the sentencing guidelines.

I have three points to make: (1) the guidelines should not be rejected, (2) a brief delay in implementation would be helpful, and (3) minor legislative refinements in the authorizing legislation should be considered.

I. The Guidelines

I have supported the concept of sentencing guidelines for the past ten years, believing that sentencing judges ought not to have the vast degree of discretion they currently have to impose sentences anywhere from probation up to statutory maximums. The Sentencing Reform Act of 1984 was a bold and creative attempt to develop a system of structured discretion. Working under the statute, the United States

Sentencing Commission has issued an initial set of guidelines that in my judgment are in the main fair and workable. In some particulars I would wish the Commission had made different choices. The degree of detail, though reduced from earlier drafts, is still more extensive than I would prefer, and the marked reduction in the availability of probation is cause for concern. Nevertheless, it is apparent that the realistic choice now facing the Congress is whether to permit these guidelines to go into effect or reject them with the hope for improvements but with the distinct risk of a less satisfactory version. Facing that choice, I urge that this version of the guidelines be permitted to take effect.

Much of the criticism directed against the guidelines is based on assumptions as to how they will work in practice. These assumptions may or may not prove to be correct. Only experience will tell, for example, whether sentencing hearings will become too elaborate and time consuming, whether the rate of guilty pleas will be reduced, whether prosecutors and defense counsel will enter into sentence bargains, whether trial judges will accept such bargains, whether trial judges will have difficulty determining the applicable guideline, whether too few or too many sentences will be imposed outside the applicable guideline, and whether the number of sentence appeals will prove too burdensome. I believe there is a reasonable likelihood that, after an initial period of adjustment to the new system by all concerned -- prosecutors, defense counsel, probation officers, trial and appellate judges, the guideline system will work well and provide a modest but useful reduction in disparity of sentences without undue costs of either sentence severity or administrative difficulties.

I recognize, however, that predicting the future is always hazardous, and this is especially so with respect to a new system like sentencing guidelines that has never before been tried on the comprehensive scale now proposed for the entire federal criminal justice system. It is possible that the new system will be too cumbersome. It is possible that it will even increase disparity in some instances by permitting differing sentences to be imposed for seemingly similar offenses and offenders without the moderating influence of parole release decisions. It is also possible that in some instances, the degree of sentence severity will be too high. But these risks are by no means certain to occur. Though they warrant the most careful scrutiny as the new system goes into operation, they ought not to prevent the experiment from beginning. If flaws develop, they should be corrected. If after a decent interval of experience it appears that the hoped for benefits are not being realized and that sentencing is simply too complex a task to be subjected to structured decisionmaking, then we must be willing to recognize that our best intentions have gone awry.

II. Delaying Implementation

Though it now appears unlikely that a delay in implementation will occur, such delay, at least for some brief interval, would be useful. The education of judges and probation officers concerning the intricacies of the guidelines has begun, but that task will be accomplished far more comprehensively if the effective date of the guidelines is postponed. In my view, no more than a six-month delay is needed.

III. Changes in the Authorizing Legislation

Whether or not the effective date of the guidelines is postponed, there are a few legislative changes in the authorizing statute that ought to be adopted to assure the fair and effective implementation of the guidelines. Three changes were contained in a bill and amendments considered by the House of Representatives in connection with H.R. 3307. Though that bill was defeated because of its provision for a nine-month delay of the guidelines, the three changes remain extremely useful.

1. The first is a clarifying change to make certain that the guidelines apply only to criminal conduct occurring after the guidelines become effective.

2. The second provides for a constitutional challenge to the guidelines to be brought before a three-judge District Court in the District of Columbia, with direct appeal to the Supreme Court.

3. The third would refine the standard that sentencing judges are to use in determining whether to impose a sentence above or below the applicable guideline range. The change seeks to avoid litigation as to what factors the Commission has considered in formulating the guidelines, litigation that could entail massive discovery of Commission documents. The change would authorize a departure only where the court finds that there is present in the case an aggravating or

mitigating circumstances, of a kind or to a degree not taken into account by the guidelines, policy statements, and official commentary of the Commission, that provides a compelling reason for departing from the applicable guideline range; in determining what factors the Commission has taken into account, the court would be required to confine its consideration to the guidelines, policy statements, and commentary of the Commission.

In addition to these three changes, there are others that the Committee may wish to consider, either prior to or shortly after November 1:

4. Judicial Safety Valve. There should be some safety valve provision added to the Sentencing Reform Act to guard against the occasional outrageously severe sentence. A few cases may occur where the guidelines, through some unanticipated quirk of calculation, call for the imposition of a severe sentence under circumstances where almost all judges would believe that a somewhat less severe sentence was appropriate. Though the sentencing judge has discretion to depart from the guidelines, and some will do so in such circumstances, there will be rare instances where a sentencing judge imposes a sentence within the appropriate guideline even though that sentence is manifestly too severe on the facts of the case. An appeal will provide no relief since the sentence is within the guideline, and technically the guideline is applicable. The limited authority of the director of the Bureau of Prisons to move for reduction under 18 U.S.C. § 3582(c) appears designed for special circumstances, such as terminal illness; moreover, the motion leaves the sentence with the sentencing judge.

Thus, in the absence of parole, there will be no mechanism to provide an opportunity to ameliorate a plainly excessive sentence. Obviously, a return to parole would defeat the purpose of fixed sentences, but some safety valve should be provided.

I suggest that the statute be amended to provide that, in addition to the grounds of appeal now provided, a defendant could appeal a sentence on the ground that it is "plainly excessive," "manifestly excessive," or some equivalent formulation. I would anticipate that it would be extremely rare for a court of appeals to revise a sentence under such a stringent standard. Nevertheless, such a judicial safety valve is needed, at least during the first few years of the new era of guideline sentencing without parole.

5. Probation. The statute should be amended to permit greater use of probation in lieu of short jail sentences. The guidelines provide that whenever the bottom of the guideline range is one to six months, some use of probation may be made, but the "probationary" sentence must include confinement in a non-jail custodial facility. That strictness was apparently adopted to assure some confinement for white collar offenders in all but extremely minor offenses. It is possible to achieve that purpose without making as substantial a cutback on probation as the guidelines now contemplate.

I suggest the statute be amended to provide that, with the exception of designated offenses, such as tax evasion, securities fraud, price-fixing, and other similar white collar offenses, probation without any custodial confinement may be imposed in any case for which the bottom of the applicable guideline range is ten months or less.

6. Statement of Reasons. The statute requires a sentencing judge to provide reasons for all sentences, both those within and those outside of the guidelines. Giving reasons for departures is obviously sensible and necessary for effective appellate review. However, there seems to be little point in providing reasons for the judge's decision to select a particular number of months within the guideline range. That range is usually narrow. Explanation for a choice between 27 months and 33 months, for example, will not be especially enlightening.

I suggest deleting the requirement to provide reasons for sentences that are within the applicable guideline range.

7. Commission Amendments. The statute now permits the Commission to submit amendments to the guidelines by May 1 of each year, to become effective six months later, unless disapproved by legislation. That timetable will be adequate once the system is in operation, but it seems inevitable that many minor amendments will need to be made on an earlier timetable during the first year of the guidelines. Some of these amendments will be needed simply to correct minor drafting errors in the guidelines and to clarify ambiguities that are noticed as the guidelines are read by judges and probation officers who must implement them.

If the November 1 implementation date is not postponed, I suggest the statute be amended to authorize the Commission to transmit to Congress amendments to the guidelines by February 1, 1988, with the time for Congressional disapproval of such amendments shortened to three months.

Conclusion

I recognize the possibility that guideline sentencing may not achieve the benefits that are hoped for in providing a sentencing system that is coherent, lessens disparity, and promotes fairness. It may be that the system in practice will be too complicated, or will cause too much delay, or will shift too much sentencing authority to prosecutors and defense counsel, or will replace the unfairness of excessive disparity with the unfairness of equal sentences for significantly different offenders. If these vices appear extensively, or even to a degree that outweighs whatever benefits are achieved, then we should face up to such results after a decent trial period and either revise the guidelines significantly or even abandon them and return to the system of unfettered judicial discretion ameliorated by parole. But the guidelines offer a sufficient prospect of improving the sentencing process to warrant their use. They should be allowed to go into effect.

United States District Court
Middle District of Tennessee
Nashville 37203

Chambers of
Thomas A. Wiseman Jr
Chief Judge

October 16, 1987

Mr. Chairman Biden and Members of the Committee:

I appear before you as Vice-President of the Federal Judges Association, an organization representing over 500 Article III judges in the United States. We passed a unanimous resolution in our Board of Directors urging delay of implementation of the Sentencing Guidelines.

In view of the recent action of the House of Representatives, conventional wisdom holds that delay will not be forthcoming. Nevertheless, we believe that our concerns regarding this dramatic revision of our criminal justice system should be made known to, and be a matter of record in, the Judiciary Committee of the United States Senate. As you are aware, we are not alone in expressing concerns about this matter. The American Bar Association, the Judicial Conference of the United States, the Criminal Defense Lawyers Association, the Federal Public Defenders Association, among many others in the responsible bench and bar, have voiced similar concerns.

First, I would like to dispel a misconception that, apparently, is extant in the Congress--that is, that federal judges urged delay in order to defeat the guidelines, and that we are opposed to guidelines because we want to protect our "turf" and unfettered discretion in sentencing. This is simply not the case. Sentencing is the most difficult part of our job! It requires soul-searching and is frequently gut-wrenching. We need and would welcome all the help we can get. Furthermore, we recognize that there is some unprincipled disparity in sentencing and that some mechanism should be available to level out the extremes on the spectrums of sentences across the nation. We would welcome general guidelines requiring justification for departures and appellate review of any such departures. Our disagreement with the solution offered should not be confused with denial of the existence of a problem. The proffered solution, however, is so rigidly mechanistic that it eliminates necessary disparity and removes humanity from the sentencing process. Some disparity is inherent in the nature of justice since criminal acts are human events committed by humans, who by nature are disparate. In this respect, we are concerned especially by the virtual elimination of probation as a sentencing option.

I attach hereto a copy of my testimony before the House committee which sets forth in detail our objections and concerns. I thank you for the opportunity to express the views of our Association.

Sincerely,

Thomas A Wiseman Jr

Thomas A. Wiseman, Jr.

Enclosure

STATEMENT OF

THOMAS A. WISEMAN, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

before the
Subcommittee on Criminal Justice
Committee of the Judiciary
United States House of Representatives

concerning

Criminal Sentencing Guidelines

July 15, 1987

Mr. Chairman and Members of the Committee:

My name is Thomas A. Wiseman, Jr. I am Chief Judge of the United States District Court for the Middle District of Tennessee. I appear before you today as Vice President of the Federal Judges Association, an organization which represents more than 500 Article III judges of this nation. On May 18, 1987, our Board of Directors unanimously adopted a resolution calling for a delay in implementation of the Sentencing Guidelines submitted to Congress on April 13, 1987 by the United States Sentencing Commission. A copy of that Resolution is attached as Exhibit 1 to my testimony.

In my testimony I shall set forth a number of compelling reasons why we believe delay is necessary, and why further consideration by the Commission and the Congress is required. Because I believe I and my experience as a trial judge are not atypical, I shall draw upon my own experience in order to give you real-life examples.

I.

THE GUIDELINES ESSENTIALLY ELIMINATE PROBATION AS A SENTENCING OPTION EXCEPT IN THE MOST MINOR OF CASES. THIS POLICY DETERMINATION APPEARS TO GO WELL BEYOND THE EXPRESSED INTENT OF CONGRESS, AND IS COUNTERPRODUCTIVE TO BOTH SOCIETAL AND FISCAL CONCERNS.

In its introductory policy statement, the Commission states:

> Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious." If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.[1]

The Commission has thus determined that the number of persons sentenced to probation is "inappropriately high" and also that probationary sentences are "ineffective."

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[1] Guidelines, 1.8.

No proof or basis for either conclusion is cited, and I believe I can demonstrate that both conclusions are erroneous.

For the last nine years I have sentenced an average of 100 people per year. Over half of those persons are placed on some form of probation. We have kept statistics since 1981 on the rate of recidivism of probationers, where recidivism is defined as those cases in which the probation officer requests the issuance of a probation violator's warrant. Our rate of recidivism has averaged less than 7 percent.[2] This means that less than 7 percent of people admitted to probation get into any kind of difficulty with the law, including but not limited to violating some condition of their probation such as reporting requirements. This tells me that supervised probation makes social good sense because over 93 percent of these people are rehabilitated.

Probation makes economic good sense as well. Exhibit 3 to my testimony sets out the savings effected between the cost of incarceration and the cost of probation. Added to this savings is the amount of money actually earned by probationers while on probation. The combination of these two figures results in a total cost benefit over the last six years of $71,786,992. These figures do not include the additional, indirect incarceration cost that would be incurred by placing the spouses and children of probationers on welfare, and providing them with food stamps and other social services. Finally, defendants put on probation are generally able to make some restitution while incarcerated defendants generally are not.

This 71 million dollar savings is the result of three judges in the Middle District of Tennessee. If our sentencing policies and caseloads are fairly typical of the country's 575 federal judges, this figure can be extrapolated to 13.5 billion dollars, or well over two billion dollars a year.

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[2] See Exhibit 2.

This social and economic analysis obviously does not take into consideration the general deterrence effect that incarceration might have. The efficacy of general deterrence is unprovable and widely debated. I suggest to you one fact, however, which is meaningful to me. In spite of these fairly liberal probation policies, we still have more people incarcerated in this country per 1000 population than any other western nation. If incarceration has a general deterrence effect, it would seem that our high rate of incarceration would have brought about a corresponding reduction in the crime rate. Unfortunately, this has not occurred. These facts suggest to me that we must address underlying causes of crime and develop other alternative punishments and rehabilitative methods to attack this extremely serious social problem. Putting more people in already overcrowded jails and prisons is demonstrably counterproductive.

II.

THE GUIDELINES WILL SUBSTANTIALLY INCREASE JUDICIAL WORKLOADS AND NECESSITATE ADDITIONAL JUDICIAL OFFICERS.

The sentencing court is required to give parties an opportunity to present information on any factor important to the sentencing determination, if that factor is reasonably in dispute. The probation officer makes the first judgment of which factors are important. The parties then respond to the presentence report and assert their position on relevant factors in writing. The court holds a hearing, probably evidentiary in order to preserve due process, and serves notice of how it intends to rule; the parties then have the opportunity to submit oral or written objections to the tentative ruling of the court.

Training of probation officers to make these judgments and apply the Guidelines properly will require more lead time than is available before November 1. The "judgment calls" the probation officer is required to make suggest problems not only of training, however; they are making discretionary choices and finding facts that they may not be qualified to make. For example, the presentence preparer will make appraisals of the value of property, and decide whether bodily injury is minor, "serious," or life threatening in order to find the proper offense level. Most probation officers do not have expertise in either property appraisal or medicine. Much more time will be required for the preparation of the presentence report and more probation officers probably will be required.

Sentencing hearings will be longer than at present, judicial workloads will be increased, and additional Article III judges appears to be an inevitable consequence of this legislation.

The most serious effect on judicial workloads is that which appears likely in the courts of appeal. An appeal may be perfected by either the defendant or the government for any allegedly incorrect application of the guidelines or departure therefrom. Thus all sentences will be appealable. Last year there were 40,000 persons sentenced by district judges and 60,000 sentenced by magistrates. If only half of these cases are appealed, the circuit courts will be paralyzed.

III.

THE GUIDELINES WILL SUBSTANTIALLY INCREASE PRISON POPULATION IN AN ALREADY OVERCROWDED SYSTEM.

As of June 25, 1987, our Federal Correctional Institutions were 56 percent over rated capacity.[3] The Federal Courts have held numerous jails and state correctional systems unconstitutionally overcrowded around the country, forcing compliance by these states to the requirements of the Eighth Amendment, and yet we are somewhat hypocritically in equally as bad shape in the Federal system.

The Sentencing Commission estimates that the Guidelines will only increase prison population by 10 percent. I believe this estimate is a gross underestimation and can demonstrate this from my own sentences over the past year. From June 1, 1986, to May 31, 1987, I sentenced 101 defendants. Of these, 44 were placed on probation. Of that 44, only 18 could have been probated under the Guidelines. Twenty would have received a minimum of 68 confinement months to a maximum of 188 confinement months. Another eight would have been required by the Guidelines to receive a minimum of 86 to a maximum of 134 confinement months. The combined maximum total for all groups would be 401 confinement months. Thus, if the Guidelines had been in effect for this one judge out of 575 in the nation, I alone would have added between 154 and 401 man-months to the prison population.[4] Again, if I am typical, in one year the Guidelines will conceivably add 7,380 man-years, as a minimum, to a current population of 48,482 or, at least, a 15.2 percent increase. This increase uses only the minimum sentence, and does not consider the increases of those guideline sentences which are above the averages currently imposed for crimes not normally receiving probation.

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[3] See Exhibit 4.

IV.

THE GUIDELINES HAVE THE INHERENT DANGER OF A SHIFT OF DISCRETION FROM THE ARTICLE III JUDGE TO THE PUBLIC PROSECUTOR.

It is unclear whether plea bargain sentences must come within the guideline rules or whether they are excluded from the guidelines altogether. If plea bargains are not controlled by the guidelines, there will be great pressure to plea bargain as many cases as possible in order to avoid the time consuming hearing and appeal process described above. If this occurs, then the broad discretion now given the district judge will be transferred to the prosecutor. This shift will occur, however, without the visibility of a normal sentencing hearing and a probation report. The discretion will not be exercised in public, as required by the present system. A non-Article III public official, the prosecutor, will replace the Article III judge in assessing sentences.

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[4] See Exhibit 5.

V.

THE GUIDELINES RAISE SERIOUS QUESTIONS OF CONSTITUTIONALITY.

It would be inappropriate for us to express an opinion on the constitutionality of the Act, the Commission, or the Guidelines, since these matters may come before some of us. We note, however, that legal scholars and commentators have raised serious questions about the constitutionality of the scheme in the legal literature and before this Committee.

In conclusion, Mr. Chairman and Members of the Committee, we urge the Congress to defer implementation of these Guidelines for at least a year. During that time, experimentation can take place. I am currently keeping detailed statistics on my own sentences vis-a-vis the Guidelines. All judges could do this and we would have an empirical base upon which to reevaluate the efficacy, workability, and cost of final implementation.

You have received resolutions requesting deferral from several of the Circuit Judicial Conferences that have met recently, and you will be receiving more. The Federal Public Defenders support deferral and express serious concern. I am confident you will also hear from the American Bar Association after its meeting this summer. Federal Judges are virtually unanimous in their opposition to these Guidelines as they now stand. When there is this much serious concern being expressed by the judiciary and the responsible bar of the country, there must be something wrong. We respectfully request that you report a bill that would thoroughly reexamine the Guidelines, and defer their implementation before November 1, 1987.

I will be happy to answer any questions you may wish to ask.

EXHIBIT 1

Resolution of the Officers and Board of Directors of The Federal Judges Association

WHEREAS:

The Officers and Board of Directors of the Federal Judges Association representing a membership of over half of the Article III judges of the United States, have considered the request of the United States Sentencing Commission for Congress to delay the full implementation of the proposed sentencing guidelines submitted by the Commission on April 13, 1987.

We unanimously believe that the delay should be for a longer experimental or testing period than the nine months period proposed by the Commission for training and education, in light of the following considerations:

We have had essentially the same system of criminal sentencing since the creation of the federal judiciary by the first Congress almost 200 years ago. Under that system, federal district judges are empowered to impose sentences that range from probation up to the maximum number of years set for the offense by Congress. There is no right to appeal the sentence unless the district judge exceeds the maximum set by Congress.

Under this system last year, the 575 district judges sentenced 40,000 offenders, mainly felons, and 467 U.S. Magistrates sentenced 60,000 offenders, mainly misdemeanants. The 55 federal prisons at the end of 1986 housed 41,000 offenders sentenced under this system. This number is relatively low compared to the number of offenders handled annually because under current practice, sanctions other than imprisonment — sanctions such as fines and conditions of probation — are imposed in approximately 50 percent of the cases.

The proposed sentencing guidelines effect a revolutionary change in this system. The uncertainties created by the new system are so great that it is impossible to tell in advance how it will work out and whether it will be practical. These uncertainties are far-reaching and affect all of the major institutions and procedures of the criminal justice system.

We do not know, for example, what impact the guidelines will have on the federal prison population. Only about 50 percent of current offenders receive prison sentences. The guidelines provide for a prison sentence in all but the most minor cases. If the number of offenders incarcerated rises substantially, as seems likely, it is unclear where they will be housed. It is likewise unclear how many new prisoners there will be under the sentencing guidelines, although all knowledgeable observers predict that the increase will be substantial.

We also do not know what effect the sentencing guidelines will have on the work of the 230 judges of the 12 regional Courts of Appeals. These judges last year decided 18,000 cases, only 3,540 or 20 percent of which were criminal appeals from the district courts. Under the guidelines, the 40,000 criminal sentences imposed by the district judges in 1986 and 60,000 misdemeanants sentenced by magistrates would all be subject to appeal. Under current practice, such sentences are not appealable.

Although a substantial increase in the number of appeals to the regional Courts of Appeals is predicted, no one knows precisely how drastic the impact will be. It may be so great that the Courts of Appeals as presently constituted will only be able to decide criminal cases because current law requires Courts of Appeals to give priority to criminal cases. If offenders appeal their sentences in half the cases, 50,000, the case loads of the Courts of Appeals would quadruple. These courts may well be unable to administer the law in other fields such as civil rights, antitrust, environment, securities, corporations and constitutional law due to the avalanche of sentencing appeals.

We do not know what effect the guidelines will have on the work load of the district judges and the magistrates. Under current sentencing practice, evidentiary hearings with live witnesses occur infrequently. Judges usually sentence offenders at a brief sentencing hearing upon conviction or guilty plea after the judge has read a probation report and after he or she has listened to argument of counsel. The proposed guidelines provide for evidentiary hearings where witnesses are sworn and testify; yet it is unclear what procedures will be followed, what time will be required and what facts will have to be established at these entirely new evidentiary sentencing hearings.

The uncertain impact on the work load of district judges arises in part because of the structure and plan of the guidelines. Instead of establishing "guidelines" in the ordinary sense of general standards or presumptions that assist the sentencing judge, these "guidelines" establish rigid rules that control the judge in the exercise of the sentencing power. The guidelines tell the sentencing judge to take into account a limited group of facts concerning the offense. Although some of the facts which now control the sentencing process are relevant under the guidelines, there are many other equally important facts which are not itemized or considered.

Under the guidelines the only conduct or facts that the judge is permitted to take into account in the first instance are those specifically listed in the applicable guidelines section for the offense in question. After these initial "relevant" facts are established, the judge can then decide if other facts not listed in the guidelines make it necessary for the judge to "depart" from the guidelines in sentencing.

The core problem with the sentencing guidelines is that the whole point of the process is to require the judge to pick one, and only one, of the 258 squares of a sentencing grid. Each of these squares has a narrow range of months beginning with 0 to 1 month at the top left and, 258 squares later, runs to life imprisonment at the bottom right. Twenty-five percent is the maximum range of discretion within a square of the grid — for example, the offense level represented by grid square 18IV allows a sentence only within the range of 41 to 51 months. The only unreviewable discretion left for the judge is to decide within this narrow range within one grid square. All decisions leading to the selection of the one correct grid square are appealable, nondiscretionary and governed by rules (requiring extensive fact finding) for each offense and offender.

Congress and the courts will be in a better position to determine what kinds of sentencing guidelines are effective and workable.

BE IT RESOLVED THEREFORE THAT:

The Officers and Board of Directors of the Federal Judges Association unanimously recommend to the Senate and House of Representatives of the United States Congress that the effective date of implementation of the sentencing guidelines be deferred for a period of one year to 18 months during which the proposed guidelines may be tested and empirical data accumulated on their workability and fiscal impact.

EXHIBIT 2

RECIDIVISM OF PERSONS ON PROBATION AND PAROLE IN THE MIDDLE DISTRICT OF TENNESSEE

	YEAR ENDING 1981				YEAR ENDING 1982			
	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM
District Court	209	8	6	3.8%	222	13	9	5.8%
Magistrate	62	4	1	6.4%	74	6	3	8.1%
Parole Commission	138	34	22	24.6%	103	35	18	33.9%
TOTALS	409	46	29	11.2%	399	54	30	13.5%

	YEAR ENDING 1983				YEAR ENDING 1984			
	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM
District Court	226	8	7	3.5%	287	15	3	5.2%
Magistrate	86	3	2	3.5%	125	5	3	4.0%
Parole Commission	105	37	30	35.2%	116	13	9	11.2%
TOTALS	417	48	39	11.5%	528	33	15	6.3%

	YEAR ENDING 1985				YEAR ENDING 1986			
	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM	NUMBER ACTIVE CASES	NUMBER WARRANTS REQUESTED	NUMBER CASES REVOKED	PERCENTAGE OF RECIDIVISM
District Court	308	22	15	7.1%	314	37	28	11.8%
Magistrate	134	6	4	4.5%	126	8	5	6.3%
Parole Commission	104	16	9	15.4%	117	21	13	17.9%
TOTALS	546	44	28	8.0%	557	66	46	11.8%

*Recidivism is defined as the requesting of a warrant alleging violation of probation/parole and revocation of supervision. Warrant request might be the result of technical violations, rather than new criminal activity.

EXHIBIT 3

COST BENEFIT ANALYSIS OF PROBATION OFFICE SUPERVISION IN THE MIDDLE DISTRICT OF TENNESSEE AS COMPARED TO COST OF INCARCERATION IN A FEDERAL INSTITUTION

YEARS ENDING

	1981	1982	1983	1984	1985	1986
Active Cases	430	420	459	546	594	60
Cost of Incarceration per inmate per year*	$ 12,556	$ 13,244	$ 12,877	$ 13,020	$ 12,923	$ 14,51
Total	$ 5,399,080	$ 5,562,580	$ 5,910,543	$ 7,108,876	$ 7,676;143	$ 8,740,43
Less Total Cost (equal to 10% of incarceration) for each client supervised in this district**	$ 540,080	$ 556,080	$ 590,733	$ 710,892	$ 767,448	$ 874,10
Total savings compared to incarceration***	$ 4,859,000	$ 5,006,400	$ 5,319,810	$ 6,397,984	$ 6,908,695	$ 7,866,33
Total earnings of clients under supervision	$ 4,143,738	$ 4,944,544	$ 5,816,674	$ 6,615,139	$ 6,852,002	$ 7,056,67
TOTAL COST BENEFIT	$ 9,002,738	$ 9,950,944	$11,136,484	$13,013,123	$13,760,697	$14,923,00

CUMULATIVE COST BENEFIT FOR 1981 THROUGH 1986 = $71,786,992

*Figures obtained from the Financial Management Section, Federal Bureau of Prisons.

**Figures obtained from Administrative Office, Probation Division.

***Figures do not include sums of monies paid to families of inmates from public assistance, food stamps, medicaid, etc.

EXHIBIT 3
PAGE 2

CASES SENTENCED IN THE MIDDLE DISTRICT OF TENNESSEE

	YEAR ENDING 1981					YEAR ENDING 1982				
	TOTAL CASES	IMPRISONED		PROBATION		TOTAL CASES	IMPRISONED		PROBATION	
		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
District Court	249	114	45.8%	135	54.2%	244	106	43.4%	138	56.6%
Magistrate	74	3	4.0%	71	96.0%	106	0	0.0%	106	100.0%
TOTALS	323	117	36.2%	206	63.8%	350	106	30.3%	244	69.7%

	YEAR ENDING 1983					YEAR ENDING 1984				
	TOTAL CASES	IMPRISONED		PROBATION		TOTAL CASES	IMPRISONED		PROBATION	
		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
District Court	318	158	49.7%	160	50.3%	306	124	40.5%	182	59.5%
Magistrate	137	23	16.8%	114	83.2%	158	9	5.7%	149	94.3%
TOTALS	455	181	39.8%	274	60.2%	464	133	28.7%	331	71.3%

	YEAR ENDING 1985					YEAR ENDING 1986				
	TOTAL CASES	IMPRISONED		PROBATION		TOTAL CASES	IMPRISONED		PROBATION	
		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE		NUMBER	PERCENTAGE	NUMBER	PERCENTAGE
District Court	227	67	29.5%	160	70.5%	251	106	42.2%	145	57.8%
Magistrate	123	8	6.5%	115	93.5%	122	5	4.1%	117	95.9%
TOTALS	350	75	21.4%	275	78.6%	373	111	29.8%	262	70.2%

	CURRENT POPULATION	RATED CAPACITY	% OVER/UNDER
ALDERSON	902	602	50
ALLENWOOD	872	530	65
ASHLAND	993	516	92
ATLANTA	1588	1077	47
ATLANTA CAMP	284	100	184
BASTROP	707	472	50
BIG SPRING	721	482	50
BORON	535	328	63
BUTNER	700	438	60
CHICAGO	517	363	42
DANBURY	1013	514	97
DANBURY CAMP	206	107	93
DULUTH	716	711	1
EGLIN	804	480	68
EL RENO	1295	751	72
EL RENO CAMP	231	144	60
ENGLEWOOD	564	385	46
FORT WORTH	830	660	26
LA TUNA	931	465	100
LA TUNA CAMP	301	168	79
LEAVENWORTH	1119	789	42
LEAVENWORTH CAMP	413	276	50
LEWISBURG	1227	982	25
LEWISBURG CAMP	201	168	20
LEXINGTON	1672	1227	36
LOMPOC	1274	1122	14
LOMPOC CAMP	618	467	32
LORETTO	497	262	90
MARION	364	415	-12
MARION CAMP	195	175	11
MEMPHIS	810	528	53
MIAMI	795	294	170
MILAN	1183	675	75
MONTGOMERY	547	256	114
MORGANTOWN	382	358	7
NEW YORK	847	458	85
OAKDALE	1083	738	47
OTISVILLE	805	438	84
OXFORD	754	476	58
OXFORD CAMP	156	104	50
PETERSBURG	848	595	43
PETERSBURG CAMP	203	150	35
PHOENIX	937	518	81
PLEASANTON	680	351	94
RAY BROOK	900	500	80
ROCHESTER	418	291	44
SAFFORD	348	206	69
SAN DIEGO	904	546	66
SANDSTONE	832	467	78
SEAGOVILLE	756	359	111
SPRINGFIELD	953	956	0
TALLADEGA	857	510	68
TALLAHASSEE	1030	646	59
TERMINAL ISLAND	1046	601	74
TERRE HAUTE	1221	832	47
TERRE HAUTE CAMP	392	192	104
TEXARKANA	862	402	114
TEXARKANA CAMP	235	144	63
TUCSON	447	195	129
BUREAU OF PRISONS	43521	27962	56
CTC'S	3178		
JAIL/DETENTION CTRS	1574		
LONG-TERM BOARDERS	101		
CONTRACT JUVENILES	108		
CONTRACT FACLS LEVEL	4961		

APPLICATION OF NEW SENTENCING GUIDELINES TO 44 DEFENDANTS (46 CASES) RECEIVING PROBATIONARY SENTENCES FROM THE HONORABLE THOMAS A. WISEMAN, JR., MIDDLE DISTRICT OF TENNESSEE, FROM JUNE 1, 1986, TO MAY 31, 1987[1]

	MINIMUM SENTENCE REQUIRED				MAXIMUM SENTENCE REQUIRED			
TYPE OF SENTENCE UNDER NEW GUIDELINES	NUMBER OF CASES	RANGE OF MONTHS	TOTAL CONF. MONTHS	APPROX. CONFINEMENT COSTS	NUMBER OF CASES	RANGE OF MONTHS	TOTAL CONF. MONTHS	APPROX CONFINEMI COSTS
Probation only.[2]	18	0	0	$ 0	18	1-6	79	$ 71,100
Confinement and supervised release; or probation requiring intermittent confinement, community confinement, or combination of both.	20	1-6	68	$ 40,800*	20	6-12	188	214,320
Confinement and supervised release only.	8	7-12	86	$ 98,040***	8	7-18	134	$152,760
TOTAL	46		154	$138,840	46		401	$438,180

*The Community Treatment Center cost per inmate per day is $25; minus $5 per day for each inmate who i working; equals net cost of $20 per inmate per day.

**The local jail average cost per inmate per day is $30.

***The federal institution average cost per inmate per day is $38.

[1] Based on these tabulations, it appears that 64% of the defendants who received probation would have received intermittent or community confinement or incarceration based on the new sentencing guideline

It also appears that the costs for these defendants would range from $138,840 to $438,180.

[2] Probation supervision costs are not reflected in this table.

DEFENDANTS SENTENCED TO PROBATION BY CHIEF JUDGE THOMAS A. WISEMAN, JR., MIDDLE DISTRICT OF TENNESSEE FROM JUNE 1, 1986, TO MAY 31, 1987

	SENTENCE RECEIVED	NEW GUIDELINES
WHITED, Glenda J. Docket No. 3:86-00211	ISS, 3 years' probation with 3 special conditions.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should be no more than 3 years.
CAMPBELL, Ronald Docket No. 3:86-00207	ISS, 13 months' probation, fined $5,000.	CAG 0 - 6 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should be 1 - 5 years.
ESTRIGHT, David Lee Docket No. 2:86-00014	*ISS, 5 years' probation with 2 special conditions.	CAG 6 - 12 months. Term of 1 year supervised release. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
WHITE, Bernard N. Docket No. 3:86-00176	CAG 2 years, ESS, 5 years' probation with 1 special condition.	CAG 4 - 10 months. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
BREWER, Larry Malcolm Docket No. 3:86-00110	CAG 1 year, ESS, 3 years' probation.	CAG 0 - 1 month. Probation is authorized.

JONES, Edward I. Docket No. 3:86-00167	ISS, 3 years' probation with 2 special conditions.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should be 1 to 3 years.
SHERRETTS, Harry Scott Docket No. 3:86-00155	ISS, 2 years' probation.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
DODD, Kelvin Paul Docket No. 1:86-00002	ISS, 3 years' probation.	CAG 12 - 18 months. Term of 2 years' supervised release required. Probation is not authorized.
ANGLIN, Ernest Docket No. 3:86-00143	*ISS, 5 years' probation with 3 special conditions.	CAG 12 - 18 months. Term of 2 years' supervised release required. Probation is not authorized.
GUY, John Robert Docket No. 3:86-00169	ISS, 2 years' probation with 1 special condition.	CAG 0 - 4 months. Probation is authorized.

NWAGBARA, Charles J. Docket No. 3:86-00145	ISS, 5 years' probation with 1 special condition.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
BUSH, Mark Stephen Docket No. 3:86-00170	ISS, 5 years' probation with 1 special condition.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
WATKINS, John W. Docket No. 3:86-00175	ISS, 2 years' probation.	CAG 0 - 3 months. Probation is authorized. If imposed, term should be no more than 3 years.
WADLEY, Hilda Jane Docket No. 2:87-00002	ISS, 3 years' probation with 1 special condition	CAG 8 - 14 months. Term of 2 years' supervised release required. Probation is not authorized.
CAUDILL, Laurie Docket No. 3:87-00018	CAG 1 year, ESS, 3 years' probation with 1 special condition.	CAG 6 - 12 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.

ANDERSON, Kelvin Docket No. 3:86-00180	ISS, 2 years' probation.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
DAVIS, Richard Docket No. 3:84-00103	ISS, 1 year's probation with 1 special condition.	CAG 8 - 14 months. Term of 1 year' supervised release required. Probation is not authorized.
GAY, Charles W. Docket No. 3:86-00103	ISS, 5 years' probation with 1 special condition.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
BUFORD, William Otis Docket No. 3:86-00093	ISS, 1 year's probation with 1 special condition.	CAG 0 - 6 months. Probation is authorized. If imposed, term should be 1 - 5 years.

READER, James Edward Docket No. 3:86-00041	ISS, 3 years' probation with 2 special conditions.	CAG 1 - 7 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
GEIGER, Eddie A. Docket No. 3:86-00102	ISS, 3 years' probation with 2 special conditions.	CAG 1 - 7 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
POLK, Gregory A. Docket No. 3:86-00065	ISS, 5 years' probation with 1 special condition.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
PERRY, Kenneth Docket No. 3:86-00137	CAG 3 years, ESS with exception of time served. ISS Ct. 5, 3 years' probation with 1 special condition.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.

McCRORY, Janelle Docket No. 3:86-00116	*ISS, 5 years' probation with 1 special condition.	CAG 0 - 4 months. Term of supervised release may be imposed. Probation is authorized.
CASEY, Joe David Docket No. 3:86-00165	ISS, 3 years' probation with 1 special condition.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized.
DENNY, Edward S. Docket No. 3:86-00202	ISS, 3 years' probation with 1 special condition.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized.
DENNY, Edward S. Docket No. 3:86-00130	ISS, 3 years' probation with 1 special condition.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized.
DUCKETT, Alan Gary Docket No. 3:86-00173	CAG 1 year, ESS, 2 years' probation with 1 special condition.	CAG 0 - 2 months. Probation is authorized.
PIGG, Billie Bryant Docket No. 1:87-00001	ISS, 3 years' probation with 1 special condition.	CAG 12 - 18 months. Term of 2 years' supervised release may ordered. Probation is not authorized.
PARKER, Raymond Hill Docket No. 3:86-00152	CAG 2 years, ESS with the exception of time served, placed on probation for remainder of 2 year period with 1 special condition.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should not exceed 3 years.

COREY, Katherine Y. Docket No. 3:86-00143	ISS, 3 years' probation with 3 special conditions.	CAG 0 - 5 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should not exceed 3 years.
BROWN, Betsy J. Docket No. 3:86-00143	ISS, 5 years' probation with 2 special conditions.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
RIGGS, James Mark Docket No. 3:86-00078	ISS, 2 years' probation.	CAG 0 - 4 months. Term of supervised release may be imposed. Probation is authorized. If imposed, term should not exceed 3 years.
NORWOOD, Paul Junior Docket No. 1:86-00007	ISS, 1 year's probation.	CAG 6 - 12 months. Term of 2 years' supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.

WHITE, James L., Jr. Docket No. 1:87-00002	ISS, 2 years' probation with 3 special conditions.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
WATKINS, Brandon Docket No. 3:86-00181	ISS, 2 years' probation with 2 special conditions.	CAG 12 - 18 months. Term of 1 year's supervised release may be imposed. Probation is not authorized.
TRICE, Harold Dean Docket No. 3:86-00181	ISS, 2 years' probation.	CAG 12 - 18 months. Term of 1 year's supervised release may be imposed. Probation is not authorized.
EARL, James Ronald Docket No. 1:86-00003	ISS, 5 years' probation with 3 special conditions.	CAG 6 - 12 months. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.

SOLOMAN, James Oscar Docket No. 3:86-00007	CAG 2 years, ESS, 2 years' probation with 2 special conditions.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
SOLOMAN, James Oscar Docket No. 3:86-00067	ISS, 2 years' probation with 3 special conditions.	CAG 4 - 10 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
WILLIAMS, Joseph Docket No. 3:86-00032	ISS, 3 years' probation with 1 special condition.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement. If imposed, term should be 1 - 5 years.
ALOU, Bob Docket No. 3:86-00154	CAG 1 year, ESS, 1 year's probation with 1 special condition.	CAG 10 - 16 months. Term of supervised release may be imposed. Probation is not authorized.

PRICE, Richard Phillip Docket No. 3:86-00096	*ISS, 5 years' probation with 2 special conditions.	CAG 2 - 8 months. Term of supervised release may be imposed. Probation is authorized provided the Court imposes a condition, or combination of conditions, requiring intermittent or community confinement.
MOORE, Gary Docket No. 3:86-00174	Ct. 1 CAG 1 year, ESS, 1 year's probation with 1 special condition. Ct. 2 ISS, 1 year's probation to run concurrent with Ct. 1.	CAG 0 - 6 months. Term of supervised release may be imposed. Probation is authorized.
SHURTS, Terry Docket No. 3:86-00030	ISS, 3 years' probation with 2 special conditions.	CAG 0 - 3 months. Term of supervised release may be imposed. Probation is authorized.
WILSON, Cathy Docket No. 3:86-00072	ISS, 1 year's probation with 1 special condition.	CAG 0 - 5 months. Term of supervised release may be imposed Probation is authorized.

*These probation cases were to run consecutive with sentences of incarceration currently being served by the defendants.

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)

October 20, 1987

Senator Joseph R. Biden
Chairman, Senate Judiciary Committee
224 SDOB
Washington, DC 20510-6275

Dear Senator Biden:

As the dissenter to the Sentencing Guidelines promulgated by the Commission I have a different view from the majority who will be testifying before your Committee later this week. I enclose a statement of my views that you may, if you wish, make part of the Committee's record.

Sincerely,

Paul H Robinson

Paul H. Robinson
Commissioner

Encls.

PHR:emh

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STATEMENT OF

PAUL H. ROBINSON
COMMISSIONER
UNITED STATES SENTENCING COMMISSION

FOR THE

SENATE JUDICIARY COMMITTEE

ON

THE UNITED STATES SENTENCING COMMISSION'S SENTENCING GUIDELINES AND POLICY STATEMENTS

WASHINGTON, D.C.

OCTOBER 22, 1987

Mr. Chairman, and Members,

I should note that my formal dissent to the guidelines is published at 52 Federal Register 18,121 (1987) and 41 Criminal Law Reporter 3,174 (1987). It contains a full discussion and specific documentation of all important points. I have five points that I think most important to make.

First, I am concerned that there is no consistent principled basis for the sentences contained in the guidelines. The lack of a coherent, rational sentencing philosophy will, I fear, generate irrational sentences, if the guidelines are followed.

The Sentencing Reform Act specifies that the first responsibility of the Commission is to establish guidelines that "assure the meeting of the purposes of sentencing as set forth in [the Act]" (28 U.S.C. 991(b)(1)(A)), that is, just punishment, deterrence, incapacitation of the dangerous, and rehabilitation. (18 U.S.C. 3553(a)(2)) Thus, existing studies on public perceptions of offense seriousness, on maximizing deterrence and rehabilitation, and on identifying dangerous offenders should have been at the center of the Commission's deliberations.

Instead of calculating guideline sentences to achieve the statutory purposes, as directed by the statute, the Commission generally set sentences according to mathematical averages of past prison terms. The existing studies on achieving the purposes of sentencing, and indeed the issues of sentencing purposes generally, were for the most part ignored by the Commission. I cannot remember a Commission meeting at which such studies were seriously discussed or reviewed--I remember only occasional meetings at which it was acknowledged that they should be discussed and reviewed. Indeed, the Commission had few substantive discussions on any topic concerning sentencing policy. As hard as it may be to believe, even the pivotal decision to follow mathematical averages of past sentences was never the subject of Commission debate or discussion. It was, rather, the result of last minute, private arrangements among Commissioners at a point when too much time had slipped by to do much more.

I believe that the Commission's reliance on mathematical averages of past sentences is likely to generate irrational sentences. Consider, for example, the case of a young addict who sells drugs to acquaintances to support his own habit. One judge may impose a long term of imprisonment in order to send a strong general deterrent message to drug sellers. Another judge may impose a very short term of incarceration followed by supervised release conditioned upon the offender's participation in a community drug treatment program, in the belief that curing the offender's addiction is more likely to remove him from the role of drug dealer.

Both sentences are rational sentences. Both sentences are calculated to serve a legitimate purpose--the first focuses on general deterrence of other potential offenders; the second focuses on the special deterrence and rehabilitation of the offender being sentenced.

But a mathematical average of the two prison terms may not serve either purpose. It may be too short to send an effective general deterrent message, and, at the same time, would fail to provide community treatment to eliminate the offender's addiction.

The Commission's job was to investigate the advantages and disadvantages of alternative sentencing policies and to make the hard decision as to which policy, or which combination of policies, ought to be followed in a given situation. This indeed was the primary reason for the Commission's creation--to make such hard decisions on the basis of the best empirical information available, in an atmosphere free of political pressures. Mathematical averages of past sentences could have been calculated as readily, and about as reliably, through a $20,000 congressional grant to the Administrative Office of the U. S. Courts; the process would not have required a $6 million per year commission.

My second general concern is that the guidelines will not reduce unwarranted disparity among judges. As the drug addict hypothetical illustrates, a major source of disparity is that different judges have different sentencing philosophies. As Senator Kennedy has noted, "[o]ne judge may sentence in order to rehabilitate, another to deter the offender or the potential offender from committing a similar crime, a third to incapacitate, while a fourth may sentence simply to punish." (Foreword, Toward a Just and Effective Sentencing System) Yet these guidelines do nothing to tell judges which purposes they should attempt to further in which situations.

This lack of policy direction is particularly troublesome because the guidelines are, for the most part, voluntary--despite the Sentencing Reform Act's direction for comprehensive and binding guidelines. For example, a key section of the Act provides that "the court shall impose a sentence of the kind, and within the range, [provided by the guidelines.]" (18 U.S.C. 3553(b)) The only exception permitted is where "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Yet the Commission's guidelines claim to give judges the authority to go outside the guideline range in a host of instances. Indeed, with the exemption of certain highly improper factors such as the race or religion of the offender the guidelines claim not to limit the factors a judge may rely on to depart from the guidelines, even if the factor is already explicitly included in the guidelines.[1]

Also in violation of the statute is the Commission's attempt to authorize judges to depart from the guideline range whenever the sentence is pursuant to a plea agreement, no matter whether the case is unusual or perfectly typical. Unless the Commission wants to argue that they never "adequately considered" any factor, I do not see how they can authorize judges to go outside the guideline range in every case for which the sentence is pursuant to a plea agreement. Eighty-seven percent of federal criminal cases are now disposed of through plea agreements.

It is important to note that even if this broad judicial discretion means that the level of unwarranted disparity in sentencing will remain the same as it is now, the unwarranted disparity in the actual time-served will be exacerbated. Today the United States Parole Commission sets the actual release dates for most offenders. In doing so, it introduces a modest, albeit inadequate, degree of uniformity in the actual time served by similar offenders committing similar offenses. When the new guidelines go into effect, however, the United States Parole Commission will lose jurisdiction to set more uniform release dates for similar offenders. What has in the past been intolerable sentencing disparity, will become actual time-served disparity.

---

[1] "[T]he Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departures . . . ." U.S. Sentencing Guidelines, Chapter One, Part A, Section 4(b) (pp. 1.6-1.7) (emphasis added).

There are, certainly, trade-offs in creating any system of sentencing guidelines. To increase uniformity in sentencing, the judgments previously left to judicial discretion must be reduced to explicit guideline provisions focusing on specific objective factors. The trade-off is that to get this increased uniformity we must increase to some degree the complexity and cost of the sentencing process. Additional time and effort is required in explicitly finding and applying the specific factors contained in any set of sentencing guidelines. My third general concern is that under the Commission's guidelines we will pay the price for increased uniformity but we will not get what we pay for. We will instead get the worst of both worlds: continuing or increased disparity and increased complexity and burden. If it is to be the judge in each case who will continue to decide the sentence, and not the guidelines, how can we justify the burden and expense of having and applying the guidelines? If we are to pay for the application of guidelines, we ought to get the binding effect that we are paying for and that the Sentencing Reform Act calls for.

This peculiarity of the Commission's guidelines--being both discretionary and burdensome--does admittedly have some significant political advantages for selling the guidelines. For those persons who support the Sentencing Reform Act's call to reduce judicial sentencing discretion, the sheer bulk of the guidelines can be pointed to to reassure them. For those who oppose the reduction of judicial discretion, it is enough to whisper of the existence of the critical loopholes, such as the exemption for sentences pursuant to a plea bargain. What great guidelines we could have had if we had spent as much time and attention on the substance of the guidelines as we spent on the selling of the guidelines.

My fourth concern is the Commission's central line of defense of its product--that is, that the guidelines can start small and get better. The guidelines are not inept and contrary to the Sentencing Reform Act, the argument goes, they are "cautious" and "realistic." The appellate courts, in reviewing the departures from the guidelines, will eventually improve the guidelines.

But, contrary to these claims, the available knowledge on guideline development and appellate review of sentences, from the states and from other countries (such as Canada), suggest that guidelines like those the Commission has created do not get better over time. The lack of guiding sentencing policies leaves each sentencing judge and appellate judge to be guided by his or her own personal sentencing philosophy, just as they were before the guidelines. Ask yourself: Toward which sentencing purpose is a sentencing judge to exercise his or her discretion in a given situation? On what basis is an appellate judge to assess the lower court's exercise of discretion? (On the basis of whether the sentence is unreasonable in light of the appellate judge's personal sentencing philosophy?)

Indeed, if eighty-seven percent of the cases are settled by plea agreements--where appeals are rare if not entirely waived --and if plea agreement cases include the vast majority of departures from the guidelines, there is a good chance that the departures from the guidelines will be just the cases that will not be subject to appellate review.

Finally, while I am concerned about the detrimental effect of these guidelines on the federal system, I believe it would be an even greater tragedy if the shortcomings of these guidelines were to reflect badly on sentencing guidelines generally. I continue to believe that sentencing guidelines and the sentencing reform movement is critical. I continue to believe as well that the federal Sentencing Reform Act of 1984 is the most insightful guideline legislation to date. The failure here is ours, the Commission's, not that of the legislation or of guidelines generally.

I urge Congress to encourage the Commission to begin their task anew, with closer attention to the directives of the Sentencing Reform Act. You may wish to consider whether it would be useful to reconstitute the Commission to make the membership part-time. This would permit replacement, if desired, of its members, including me. (Some of my colleagues may suggest that only I need be replaced, but I am not convinced that this will help matters.)

By making Commission membership part-time, you may significantly increase the size of the pool from which qualified appointees might be drawn. There are dozens of men and women in the country, who have no partisan political connections, who have devoted much of their professional careers to the very goals of rational and uniform sentencing that you set in the Sentencing Reform Act, but who understandably may be reluctant to interrupt their career to accept a full-time appointment. I urge you to permit these people to be called upon. The membership of the Commission may be the single most important factor in successfully bringing about the sentencing reforms that the Act calls for.

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
FOR THE
NORTHERN DISTRICT OF OHIO

EDWARD F. MAREK
FEDERAL PUBLIC DEFENDER

October 20, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee On The Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

Thank you for your letter of October 8, 1987, in which you extend an invitation to submit written testimony on the new sentencing guidelines which are the subject of an October 22, 1987 hearing of the Judiciary Committee.

On behalf of federal public and community defenders, I am pleased to submit for consideration of the Judiciary Committee a statement on the sentencing guidelines and policy statements of the Sentencing Commission. As indicated, this statement was previously submitted to the Subcommittee On Criminal Justice, Committee On The Judiciary, United States House Of Representatives.

I would also like to take this opportunity to address several urgent issues concerning the sentencing guidelines in light of the November 1, 1987 effective date. These issues include the question of a delay in implementation of the guidelines, application of the guidelines to offenses committed prior to November 1, 1987, the applicability of Rule 35(b), Federal Rules of Criminal Procedure, and the applicability of current parole and good-time laws to defendants sentenced after November 1, 1987 but not under the guidelines.

First, I would like to briefly comment on the call for a delay in the implementation of the guidelines. There remains a clear need for a delay. Many groups and individuals have recently urged the House of Representatives to approve a nine month delay and I need not identify them here. Suffice it to say, that after the recent House of Representatives vote against a delay, the reality of guideline sentencing becoming law in a few short weeks is sobering. There simply is not sufficient time left for the courts, probation officers, prosecutors and defense attorneys to become familiar enough with the complex system of

75 PUBLIC SQUARE SUITE 410 CLEVELAND, OHIO 44113
PHONE: 216/522-4856
FTS/942-4856

sentencing guidelines produced by the Sentencing Commission. Furthermore, both district and appellate courts must now hastily put in place procedural rules for the application and implementation of the guidelines. Indeed, as the federal criminal justice system struggles to master one version of the guidelines and commentary, as late as the middle of October, 1987, the Sentencing Commission promulgated yet another version of guideline commentary. Of course, the central problem with a criminal justice system unprepared to properly apply the sentencing guidelines is that defendants improperly sentenced must endure a lengthy appeal process or habeas corpus review to correct mistakes. Parole and Rule 35(b) motions for modification of sentence will no longer be available as avenues of relief to address improper sentences.

While the Supreme Court recently held in *Miller v. Florida*, ___ U.S. ___, 107 S.Ct. 2446 (1987), that Florida violated the ex post facto clause in applying amended sentencing guidelines to an offense committed prior to the effective date of the amendments, Congress should not rely upon this decision to address the ex post facto problem that will exist if the federal sentencing guidelines are applied to offenses committed before November 1, 1987. Rather, Congress should simply enact legislation providing that the guidelines apply only to offenses committed after their effective date.

Furthermore, if the guidelines are not applied to offenses committed prior to November 1, 1987, a question exists whether the parole and good-time laws in Chapters 309 and 311 of Title 18, United States Code, will apply to persons sentenced after November 1, 1987 (whose offense conduct occurred before that date). This problem arises in light of the repeal language in section 235 of Pub.L. 98-473, Title II, as amended. Legislation is needed to assure that current parole and good-time laws are applicable to persons sentenced after November 1, 1987 for offenses committed prior to that date.

Finally, legislation is urgently needed to assure that Rule 35(b), modification of sentence, remains available for defendants sentenced before November 1, 1987, as well as for persons sentenced after November 1st for offenses committed prior to that date. As to persons sentenced before November 1, 1987 whose cases are now on appeal, a special problem exists of preserving their right to apply for modification of sentence under Rule

Honorable Joseph R. Biden, Jr.
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35(b). In such cases, the district courts may not have jurisdiction to entertain a motion filed prior to November 1, 1987 to preserve Rule 35(b) rights. Legislation is needed to preserve access to Rule 35(b) for defendants sentenced both before and after November 1, 1987, as to whom the guidelines will not apply. I understand that a technical amendments bill which accomplishes this result was passed by the House (HR 2182) and is currently before the Judiciary Committee. We support the Rule 35(b) aspect of that bill.

On behalf of federal public and community defenders, I appreciate your invitation to submit written testimony on this important subject and I remain available to address additional questions.

Very truly yours,

Edward F. Marek

EFM:pd
Enc.

STATEMENT OF
FEDERAL PUBLIC AND COMMUNITY DEFENDERS
REGARDING
SENTENCING GUIDELINES AND POLICY STATEMENTS
OF THE
UNITED STATES SENTENCING COMMISSION
SUBMITTED TO CONGRESS APRIL 13, 1987

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

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OVERVIEW

Presumptive guideline sentencing will bring profound changes in the administration of criminal justice in the federal courts. Accordingly, for approximately the past 18 months federal public and community defenders have undertaken to meet the obligation placed upon us by Congress in the Sentencing Reform Act of 1984 to "submit to the [Sentencing] Commission any observations, comments, or questions pertinent to the work of the Commission whenever [we] believe such communication would be useful." 28 U.S.C. §994(o). Thus, we have submitted a score of position papers covering a wide variety of subjects on guideline sentencing and have testified at virtually all of the Sentencing Commission's hearings held in Washington and across the country. Moreover, we have participated in several informal working sessions with Commissioners and staff.

Our purpose is to provide comment and input on the guideline drafting process not merely from the point of view of an advocate in an adversary system of justice, but also from our overall concern with the impact of guideline sentencing on the administration of criminal justice in the federal courts. We believe that our comments and suggestions have been received with genuine interest by the United States Sentencing Commission and we note that the guidelines submitted to Congress, in some respects, reflect a consideration of our views and experience.

However, for several reasons we must urge Congress not to accept the April 13, 1987 draft of the guidelines and policy statements. One important reason is that, in our view, the Sentencing Commission has not given sufficient consideration to probation as a legitimate sentence in appropriate cases, contrary to the intent of Congress in enacting the Sentencing Reform Act of 1984. The result will be a diminished availability of probation. The guidelines relegate probatable sentences to the bottom range of the imprisonment table, an important component of the guideline package which the Commission has submitted to Congress. Instead of using a single imprisonment table, we argue that Congress intended that the Commission draft a separate guideline for use by judges in making the threshold decision of whether to impose probation or jail for all offenses for which probation is not otherwise precluded by law. As a closely related problem, we believe the Commission has erroneously concluded that certain offender characteristics, now widely used in sentencing, generally should no longer be relevant in sentencing.

Another fundamental problem concerning the guidelines as submitted to Congress is the failure of the Commission to include, and to advocate, a comprehensive structure of procedural due process. Guideline sentencing, of necessity, requires objective fact-finding of the most fundamental kind. Thus, under the guidelines, sentences will be based upon objective criteria involving not only the offense of conviction, but, in many instances, conduct for which a defendant has been neither indicted nor convicted. We recognize that the Sentencing Commission is not empowered to promulgate rules of criminal procedure; nevertheless, it was given a mandate by Congress to fashion policy statements concerning aspects of application of the guidelines and to recommend to Congress new statutes and rules of procedure which it views as necessary to promote guideline sentencing. 28 U.S.C. §994(a)(2) and §995(a)(20) The Commission has not adequately undertaken either responsibility in connection with the issue of procedural due process.

Finally, we believe that before any guideline draft is implemented nationally it must be utilized on an experimental basis in a limited testing area or areas to evaluate its utility and impact on the Federal criminal justice system.

I. THE DIMINISHED AVAILABILITY OF PROBATION

A. Introduction

Presumptive guideline sentencing is a very powerful mechanism, which argues for great care and circumspection in its implementation. In non-capital cases which carry possible imprisonment, the prime decision is whether to place the defendant on probation or to incarcerate. That prime decision has been reduced to a cipher in the guidelines. The Commission has placed probatable sentences in the bottom ranges of the imprisonment table,[1] thereby making applicable the 25% range which limits the maximum and minimum of any prison term.[2] The probation decision, however, does not belong in the imprisonment guideline table at all; rather it must be the subject of a separate guideline. It would necessarily be a more subjective guideline, probably taking a narrative form.

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[1] United States Sentencing Commission, Sentencing Guidelines and Policy Statements, April 13, 1987 (incorporating amendments submitted to Congress May 1, 1987) (hereafter "guidelines"), at p. 5.2.

[2] More precisely, the maximum of the range may not exceed the minimum by more than 25%. 28 U.S.C. §944(b), as amended by Pub.L. 99-363 to except ranges of six months or less at the bottom and the ranges including life at the top.

B. Requirement For A Separate Type-of-Sentence Guideline

It is clear that pursuant to the statute the "determination whether to impose a sentence to probation, a fine, or a term of imprisonment" must be the subject of a guideline.[3] The equal treatment of probation and custody as alternate sanctions is manifest from 28 U.S.C. §994(a)(1)(A) and (a)(1)(B), which set out the type of sanction as the first sentencing decision and the length of the type of sanction as the second sentencing decision. Title 18 U.S.C. §§3551 and 3553 reinforce the dual nature of the sentencing decision and the independence of the two parts of the decision. Section 3551 states that both probation and incarceration are sentences. Section 3553(a)(2) describes factors to be considered by the judge in deciding the sentence. These factors go beyond those numerically quantified by the guidelines and include promotion of respect for the law, "just" punishment, provision to the defendant of needed educational and vocational training, medical care or other treatment in the most effective manner, as well as an appraisal of the kinds of sentences available. The legislation itself (28 U.S.C. §994(j)) suggests that the guidelines should call for a sentence other than imprisonment, in the case of a nonserious, nonviolent first offender. In addition, the Senate Report[4] contains numerous references to Congressional expectation that there be guidelines calling for probation in appropriates cases.[5]

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[3] 28 U.S.C. §944(a)(1)(A).

The Commission has not created guidelines for making the probation-incarceration decision. The lowest guideline range authorizing probation also punishes by up to six months actual imprisonment. Thus, the probation decision is part of the imprisonment decision, not a separate decision as suggested by the Senate Report referenced at notes 4 and 5. Not only is this inconsistent with the statute, this seems a distinct departure from current practice because it implies that a defendant who would be sentenced to probation under the guidelines is the same defendant who today might be considered for a sentence of eighteen months with parole eligibility at one-third of sentence, or six months. Real sentencing today -- not unwarrantedly disparate sentencing, but sound sentencing -- authorizes probation for a broader range of defendants. Even the new law establishing guideline sentencing considers a broader range of defendants to be legally probatable, since it only excludes A or

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[4] S.REP. No. 225, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182-3717 (hereafter "Senate Report").

[5] Senate Report at 75 n. 162, 92, 172-175; see also 59, 76-77.

B felonies, and cases where the defendant must otherwise be sentenced to imprisonment.[6]

To match current sound, proper sentencing practice, it would be necessary to move the probatable sentence range further up the imprisonment guideline table. Of course this is mathematically impossible with a single guideline for imprisonment ranges which include probation because under 28 U.S.C. §994(b) only the range with a six month ceiling can have a zero floor.

It may be that the Commission resisted the notion of a published guideline calling for probation for fear that such guidelines might diminish the deterrent effect of the penal statutes. However, this potential problem is avoidable, as we set out below. All of these considerations compel the conclusion that the Commission has improperly placed the probation decision in the imprisonment guideline table.

Other provisions of the statute mandate that the probation versus imprisonment decision be the subject of a separate, threshold guideline. The first stated statutory purpose of the Commission is to establish policies and practices which will "assure the meeting of the purposes of sentencing."[7] As earlier noted, those purposes are summarized as just punishment, deterrence, incapacitation, and rehabilitation.[8] The Senate Report makes it clear that, in establishing the sentencing scheme, one object is not favored over another.[9] Further, in a given case, one object may have more bearing than the others, and in some cases, there may be only one identifiable object to be served in imposing a criminal sanction.[10]

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[6] 18 U.S.C. §3561(a).

[7] 28 U.S.C. §991(b)(1)(A).

The court is required to consider those core purposes of sentencing, among other things,[11] in determining the sentence to be imposed. It is not possible to reduce those purposes of sentencing which lie at the heart of the scheme to a mathematical computation. Put another way, it is not possible for the Commission to subsume all of those mandatory goals into a formula of numbers.

One of the core purposes of sentencing, which carries equal weight, is rehabilitation. References to the "outmoded rehabilitation model" in the legislative history mean only that rehabilitation of an offender cannot be expected if imprisonment is the chosen sanction.[12] The sense of the Senate Report is that the sentencing purpose of rehabilitation is still important in determining whether a sanction other than imprisonment is appropriate in a particular case and that rehabilitation is to be sought outside of the prison setting.[13] The sentencing judge's assessment of a defendant's rehabilitative potential, based on face to face contact and discourse in open court, cannot be supplanted by a number calculated in advance. Conversely, whether a defendant needs to be isolated can be hinted at by numbers, but it cannot be more reliably determined in that manner than by direct judicial assessment informed by a non-numerical guideline.

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[8] See 18 U.S.C. §3553(a)(2)(A) through (D).

[9] Senate Report at 68, 76-77 and n. 166.

[10] Id. at 77.

[11] The other things are: the nature and circumstances of the offense and history and characteristics of the defendant; the kinds of sentences available; the guidelines; the policy statements; and the need to avoid unwarranted sentence disparities. 18 U.S.C. §3553(a).

The first listed purpose of sentencing, summarized as just punishment, also includes the component of promoting respect for the law.[14] The Senate Report gives the example of an offense of little notoriety, not frequently committed, with little likelihood of recidivism, thus presenting the paramount purpose of rehabilitation, as a case which "may well almost mandate a sentence to probation."[15] None of those factors lend themselves to numerical quantification.

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[12] Senate Report at 38; see also 28 U.S.C. §994(k).

[13] Senate Report at 76-77, 91.

[14] 18 U.S.C. §3553(a)(2)(A).

Another purpose of sentencing is deterrence.[16] If it is within the knowledge of the sentencing judge that a particular type of crime is increasing rapidly in a particular area at a particular time, that judge may well wish to give more weight to the purpose of deterrence than a prefabricated guideline might permit.[17]

A fundamental objection to regulating the probation versus imprisonment decision by the mathematical formula of the guidelines is that such formula fails to consider any non-numerically quantifiable factors -- indeed, by definition, it is incapable of doing so. Yet the achievement of the specified purposes of sentencing (which do not lend themselves to numerical measurement) is one of the principal goals of the system.

The purpose of guideline sentencing can best be achieved by a threshold guideline which informs the determination of type of sentence, as between incarceration and probation in the first instance. It should explicate the purposes of sentencing as set out in the statute, emphasizing that no one goal is paramount --

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[15] Id. at 92.

[16] 18 U.S.C. §3553(a)(2)(B).

[17] See Senate Report at 92.

that instead, the selection of a type of sentence requires the judge to identify which goal or goals of sentencing may be served in a particular case, and to rank those goals as to priority. This guideline could be augmented by one or more policy statements providing more details guidance as to its application.

While such a guideline will not produce a number result, it is nowhere written that all guidelines must yield mathematic precision. Some guideline subjects may be amenable to such treatment; the determination of whether to place a person on probation is not. To govern the imprisonment decision by mathematic formulas trivializes the most important decision to be made in a non-capital case.

During the Commission's public hearings, the question has been posed whether the imprisonment decision can be handled any way other than the guideline solution, in light of the provisions of 28 U.S.C. §994(b).[18] Put another way, how may the guidelines say on the one hand that if an offender is imprisoned for eight years, that term of imprisonment may not vary outside its 25% range, but on the other hand the offender may be placed on probation?

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[18] Section 994(b), of course, states in part: "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 percent . . . ."

The answer must first be sought in the language of §994(b) itself. The 25 percent rule applies only _if_ the sentence specified by the guidelines includes imprisonment. If Congress intended to impose this degree of restriction upon every sentencing decision, it certainly knew how to say so. Instead, the remaining first sentence of §994(b) speaks to the full spectrum of sentencing options in this way: "The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." Thus, the Congressional mandate is that the guideline scheme as a whole comply with Title 18, and that sentences of imprisonment within the guidelines comply with the 25 percent rule. The rigidity of the imprisonment rule should not be gratuitously extended to other sentencing decisions which are not amenable to such treatment. As discussed above, whether an offender is to be placed on probation or imprisoned is such a decision.

The instant proposal for a type-of-sentence guideline is faithful to §994(b) by effectuating the first sentence of that subsection. It would require that the sanction be selected in accordance with 18 U.S.C. §3553(a), the most pertinent section of Title 18. Such a guideline, necessarily more subjective than most others, would still be a guideline, subject to review for "incorrect application."[19] Even if reversals for incorrect application of the type-of-sentence guideline should be infrequent, this is inherent in the nature of the sentencing judge's decision.

C. Probation is a Sentence

In current practice, probation is sometimes thought of as an alternative to a sentence. Under federal guideline sentencing, probation is a sentence, rather than the absence of a sentence or the suspension of a sentence.[20] Probation is, of course, an alternative to imprisonment, and a powerful one.[21]

The manner in which probation is imposed under the new law is significant. Under current law, there are two forms of probation: sentence imposed but execution suspended, and imposition suspended.[22] The former is more common, and when the

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[19] 18 U.S.C. §3742(a)(2).

[20] 18 U.S.C. §3551(b).

[21] The Senate Judiciary Committee did not consider a sentence of imprisonment to be the only form of sentence carrying deterrent or punitive weight. "It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose." Senate Report at 92.

[22] 18 U.S.C. §3651.

sentence imposed is less than the maximum, this constitutes a form of leniency because the sentence may not later be increased. Under the new probation law, every sentence to probation will take the form of deferring the selection of the imprisonment sanction which means the full maximum statutory range will be available upon any revocation. Any intervening misconduct which formed the basis for revocation may worsen the person's position in the guideline. This enhances the deterrent effect of probation.

Unlike the very general treatment of conditions of probation in current law,[23] the new law is quite specific. First, for any offense, it is a mandatory condition that the defendant not commit another offense,[24] and, for a felony, it is a mandatory requirement that the defendant pay a fine, or restitution, or do community service as a condition of probation.[25] For the first time, nineteen discretionary conditions are specified by statute.[26] Also new is a provision for custody in intervals, such as nights or weekends, as a condition of probation.[27]

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[23] 18 U.S.C. 3651.

[24] 18 U.S.C. §3563(a)(1).

[25] 18 U.S.C. §3563(a)(2).

[26] 18 U.S.C. §3563(b).

[27] 18 U.S.C. §3563(b)(1).

The guidelines have called attention to other alternatives to straight imprisonment which may be imposed as conditions of probation, such as community confinement and home detention, community service, order of notice to victims, and occupational restrictions.[28] The Senate Report makes it clear that the Congressional intent was to create a full range of sentence options.[29] The Act requires the judge to consider all sentences, and it is neutral on what sentence is appropriate for a given offense,[30] except as explicitly stated.[31]

D. The Balance Between Certainty and Fairness

The challenge of guideline sentencing is to achieve greater certainty without compromising fairness. The twin goals of certainty and fairness are mentioned twice in the statutes,[32] and they are coupled both times. The guidelines would achieve some measure of certainty, but at considerable expense to fairness.

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[28] Guidelines, Chapter Five, Part F, pp. 5.19-.22.

[29] Senate Report at 59.

[30] Senate Report at 78.

[31] See, e.g., 28 U.S.C. §944(h), (i) and (j).

[32] 28 U.S.C. §§991(b)(1)(B) and 994(f).

The purpose of guideline sentencing is to "avoid unwarranted sentencing disparities",[33] and not to eliminate all apparent disparity, which is neither possible nor desirable. The Senate Report's section analysis of 18 U.S.C. §3557 on sentence review says that the "procedures introduced by this bill are designed to eliminate from Federal criminal law the plainly disproportionate sentence."[34] Elsewhere, the Report states that "[t]he Committee does not intend that the guidelines be imposed in a mechanistic fashion."[35]

The enunciation of the purposes of federal sentencing for the first time[36] is a significant improvement. This, coupled with the requirements that the sentencing judge consider them, and state the reasons for imposing a particular sentence,[37] and the advent of sentence review, will in themselves achieve significant reduction of unwarranted sentencing disparities. The guidelines should not go further than the law requires by imposing the strict mathematic precision (or pseudo-precision) of the imprisonment guideline table on all judicial decisions. To do so sacrifices fairness in pursuit of certainty.

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[33] 28 U.S.C. §991(b)(1)(B).

[34] Senate Report at 86, emphasis added.

[35] Senate Report at 52.

[36] In 18 U.S.C. §3553(a).

[37] 18 U.S.C. §3553(c).

II. OFFENDER CHARACTERISTICS

A. Introduction

At the heart of the Commission's denigration of probation as a sentence is its conclusion that "under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders" in various categories of cases. (Guidelines at p. 1.8, hereafter p. ___) This conclusion is advanced without supporting argument, empirical data or analysis. Instead of justifying the conclusion that probation is overused, the Commission "solves" this perceived flaw in present sentencing practices by writing "guidelines that classify as 'serious' . . . many offenses for which probation is now frequently given." (p. 1.9) This "solution" substantially undermines the Congressional expectation that there be guidelines calling for probation in certain cases. 28 U.S.C. §994(a)(1) and §994(j).

In achieving its purpose of few probationary sentences, the Commission ignores Congressional direction concerning the relevance of certain offender characteristics in shaping appropriate and fair sentences. Chapter Five, Part H, of the guidelines includes policy statements discussing the relevance of these specific offender characteristics. These policy statements demonstrate the Commission's disregard for Congressional intent in order to promote its view that probationary sentences are overused.

B. The Vision of Congress

In order to assist the Commission in achieving its purpose of establishing sentencing guidelines which will promote the ends of justice, Congress directed the Commission to consider whether and to what extent certain specific offender characteristics are relevant to a fair sentencing process. Congress ordered consideration of a variety of factors including the offender's age, education, vocational skills, mental condition, physical condition, employment record, family ties and responsibilities, community ties, role in the offense, criminal history and degree of dependence upon crime for a livelihood. 28 U.S.C. §994(d). Thus, Congress saw that these types of characteristics are historically and properly considered by judges when shaping a fair sentence which takes into account the individual life circumstances which may have affected a particular defendant's involvement in the criminal justice system. It should seem obvious that one's age, mental condition, educational and employment background and other life experiences necessarily impact on the reasons why an individual commits a crime and may suggest a sentence which will "most effectively lessen the likelihood of future crime." (p. 1.3).

While recognizing the necessity of analyzing the relevance of particular offender characteristics in fashioning a sentence, Congress went on to direct the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities and community ties of the defendant." 28 U.S.C. §994(e). (Emphasis added) Thus, Congress intended that the guidelines be fashioned in a way which would "guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties."[38] Congress foresaw that some offender characteristics are more relevant to the sentencing function when shaping a probationary sentence. For example, as the Senate Judiciary Committee suggests, in cases where a defendant is unemployed and his involvement in crime may be related to his unemployment problem, sentencing judges should be permitted to impose a sentence of probation rather than the sanction of incarceration, if such probation can provide for an employment training program and assure the safety of the community.[39] This Congressional purpose is appropriate and reflects the present practice of sentencing judges who routinely take into account the rehabilitative needs of a defendant whose crime does not require imprisonment.

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[38] Senate Report at 174.

[39] Senate Report at 174-175.

Similarly, Congress asked the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed education or vocational training, medical care, or other correctional treatment." 28 U.S.C. §994(k). When read together with 28 U.S.C. §994(d)(5), wherein Congress explicitly directs the Commission to consider what relevance the physical condition of the defendant, including drug dependence, should have on the sentence imposed, it is clearly suggested that, at least in some cases, drug dependence or alcohol abuse may trigger consideration of a sentence of probation instead of imprisonment.[40]

In sum, Congress saw that certain offender characteristics will be relevant to the sentencing function. At the same time, Congress was concerned that considerations of community status or lack of education, employment or poor mental health not be used as a basis for imprisoning individuals. The Commission has fashioned policy statements related to specific offender characteristics which ignore and, at times, directly conflict with the will of Congress.

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[40] Senate Report at 173.

C. The Commission's View of Offender Characteristics

Part H of Chapter Five of the guidelines sets forth the Commission's policy statements on specific offender characteristics. The policy statements define the relevance of the offender characteristics set forth in 28 U.S.C. §994(d). The policy statements are generally at odds with the intent of Congress and the clear language of 28 U.S.C. §994(e). Significantly, these policy statements include no commentary or explanation. The omission of commentary is telling; the policy statements are irreconcilable with Congressional intent, they cannot be "explained." Below, we identify some of the more obviously flawed decisions of the Commission as to the relevance of certain offender characteristics.

The Commission has determined that age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. (Guidelines, §5H1.1, hereafter §____) The policy statement on age goes on to note that "neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options." Clearly, age of an offender is relevant when sentencing options are available. For example, a defendant's age and level of maturity will have unquestioned relevance in certain offense situations. Offenses in which participation reflects the exercise of poor judgment rather than venality on the part of the offender, the fact that the offender is especially young or immature should, we believe, be considered as a mitigating factor in assessing his or her blameworthiness and the sentence to be imposed. Indeed, age becomes especially relevant in a case where there is evidence that the young offender was led astray by an older codefendant. Similarly, in cases involving defendants of very advanced years, concerns regarding life expectancy and health are factors which the court may consider in making sentencing decisions.

Because age is seemingly relevant in so many potential situations, the Commission's conclusion that it is not ordinarily relevant does not reflect current sentencing practice.

Section 5H1.2 discusses education and vocational skills. The Commission has determined that education and vocational skills are not relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Further, the Commission has concluded that, "if, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervisory release, these considerations may be relevant in a determination of the length and conditions of supervision." This pronouncement is contrary to 28 U.S.C. §994(e). In §994(e), Congress directed the Commission to assure that education and vocational background are generally not appropriate considerations in fashioning a sentence of imprisonment. Conversely, when probation is a sentencing option, the educational and vocational skills of the defendants are relevant. Inexplicably, the Commission has concluded otherwise. It is difficult to envision a credible argument supportive of the Commission's policy on education and vocational skills. Judges today routinely fashion sentences which take into account a defendant's lack of education or vocational skills when the same is found to have been a contributing or causative factor for involvement in criminal activity. Where circumstances indicate that the defendant will be responsive to the opportunity to pursue educational and training programs, courts have traditionally fashioned probationary sentences conditioned upon participation in such programs to allow the defendant the opportunity to hone skills which will "lessen the likelihood of future crime." (p. 1.3)

As directed by Congress, the Commission has announced a policy statement related to the mental and emotional conditions of the defendant. Here too, the Commission has determined that mental and emotional condition are not ordinarily relevant in determining whether a sentence should go outside the guidelines. (§5H1.3) However, 28 U.S.C. §994(k) states that the Commission shall insure that the guidelines reflect the inappropriateness of sentencing an individual to imprisonment for the purpose of providing the defendant with medical care. In other words, probationary sentences, not imprisonment are to be imposed when the rehabilitation of the defendant is the primary sentencing aim. Accordingly, Congress directed the Commission to be sensitive to a defendant's mental or emotional condition and to consider the same as relevant when fashioning a probationary sentence designed to provide rehabilitative relief. The intent of Congress speaks to the reality of fair sentencing. For example, should our sentencing courts ignore the depression suffered by an individual who robs a bank with a demand note during the Christmas season shortly after being laid off from a job which he has maintained for 20 years? This individual, who has never been in trouble before, is entitled to have the court consider, as a mitigating factor, his depressed emotional state as a significant contributor to the aberrational criminal misconduct. In such a case, a sentencing court today may well look towards fashioning a probationary sentence which would include mental health counseling to assure that the defendant had resources available to assist him in overcoming the depression. The Commission's policy statement creates a barrier for judges who wish to craft just sentences.

Next, the Commission discusses the relevance of the physical condition of a defendant, including drug dependence and alcohol abuse. The Commission has found that physical condition is not ordinarily a relevant sentencing factor. More importantly, the Commission goes on to state that drug dependence or alcohol abuse "is not a reason for imposing a sentence below the guidelines." (§5H1.4) In justifying this stance, the Commission notes that substance abuse is highly correlated to an increased propensity to commit crime. We agree that substance abuse and crime often walk hand in hand. Nevertheless, sentencing judges are confronted daily with situations where substance abuse may operate in a way which suggests imposing an intense and carefully structured probationary program. In cases where a defendant has not previously been afforded treatment opportunities, and the guidelines would otherwise call for a short or moderate term of imprisonment, the court should consider the substance abuse problem as a mitigating circumstance militating in favor of a sentence of probation with a special condition of treatment in a community-based program, perhaps after a brief period of incarceration to "dry-out" from the use of the abused substance. Support for this approach can be found in the Senate Committee Report on the Sentencing Reform Act.[41] The policy statement of the Commission effectively emasculates the flexibility that is necessary for judges to fashion appropriate sentences in the troublesome area of crime which can be correlated with substance abuse.

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[41] Senate Report at 173.

D. Conclusion

The Commission's treatment of specific offender characteristics is troubling. A defendant's age, education and vocational skills, mental and emotional condition, physical condition and dependence on alcohol or drugs have always been factors which sentencing courts consider when crafting individualized sentences for defendants involved in the federal criminal justice system. Congress anticipated that these factors would continue to be used by courts under guideline sentencing. Thus, it re-enacted 18 U.S.C. §3661 (formerly 18 U.S.C. §3577) as part of the sentencing reform legislation package. This statute places "[n]o limitation . . . on the information concerning the background [and] character . . . of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." The Commission's treatment of specific offender characteristics is contrary to this clear Congressional pronouncement.

Congress has asked the Commission to assure that courts are afforded sufficient flexibility under the guidelines to permit the principled practice of individualized sentencing. 28 U.S.C. §991(b)(1)(B). The Commission has failed in its mission and, in fact, has announced policy statements regarding specific offender characteristics which directly conflict with Congressional intent. In so doing, the Commission has determined that mitigating information offered on behalf of a defendant is "not relevant" or "ordinarily not relevant" to sentencing decisions where the guidelines provide sentencing options. These pronouncements are emblematic of the Commission's apparent disregard for probationary sentences. Judges are now faced with the prospect of either being unable to impose fair sentences or, being required to justify sentences which are clearly fair. Surely, this is not what Congress intended nor is it a desirable result. It is our view that Congress should refuse to accept the guidelines and policy statements as submitted by the Commission and, again, direct that body to develop guidelines which reflect "the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. §994(j). Accompanying policy statements should take into account the mitigating impact of specific offender characteristics such as age, education and vocational skills, mental and emotional condition, physical condition, and alcohol or drug dependency. Use of probationary sentences should be encouraged, not discouraged, where the ends of justice are met without imprisonment.

III. PROCEDURAL DUE PROCESS IN GUIDELINE SENTENCING

A. Introduction

We believe that it is critical that guideline sentencing occur under fair adjudicatory procedures and be based upon adequate fact-finding. Although the sentencing guidelines themselves deal with procedures in one or two places, they do not create a clear comprehensive procedural framework for their application. The guidelines should not be permitted to become effective until such a framework is created by Congress. We are particularly concerned over the guidelines' use of so-called "real offense" conduct to establish sentences. Use of this unadjudicated conduct creates the potential for an "end run" around the normal criminal adjudicatory process resulting in sentencing defendants for offenses that a prosecutor could not otherwise prove.

As developed further below, the Sentencing Commission has indicated that the courts, in applying the guidelines to situations where the facts are disputed, may be required to hold evidentiary hearings. See Sentencing Guidelines Chapter 1A4 (a) (p. 1.6) and §6A 1.3 Commentary (p. 6.3), citing with apparent approval the Fatico cases, 579 F.2d 707 (2nd Cir. 1978), on remand; 458 F.Supp. 388 (E.D. N.Y. 1978), aff'd; 603 F.2d 1053 (2nd Cir. 1979). In what follows, we argue (1) that the Fatico principles should be explicitly embodied in a rule, and (2) that revised Rule 32, Federal Rules of Criminal Procedure, effective November 1, 1987, is seriously flawed in giving probation officers responsibility which is the court's alone.

B. The Commission's Recognition of the Fatico Fact-Finding Procedure

Until the advent of the guidelines, it will be unusual for federal judges to make detailed findings of fact in connection with sentencing. One rather well known exception occurred in the Fatico cases.[42] There, after the defendant plead guilty, the government told Judge Weinstein that it had evidence that Fatico and his brother co-defendant were "made members" of the Gambino organized crime family. Since the evidence was partially based on information provided by unidentified informants through the testimony of F.B.I. agents, Judge Weinstein excluded it. The Court of Appeals reversed, holding that information from undisclosed informants may be proper at sentencing if sufficiently corroborated. On remand, the district court held an evidentiary hearing, at which 10 witnesses testified, 7 being law enforcement agents who stated that a total of 17 different informants had confirmed to them that the Faticos were longtime active members of the Gambino family. On the basis of this evidence, Judge Weinstein, applying a clear and convincing evidence standard of proof, found that the Faticos were indeed members of the Gambino family, and as a result sentenced them to terms greater than they otherwise would have received.

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[42] There are a few other exceptions; one is the case of a second offender sentencing provision, such as provided in 21 U.S.C. §841. But there is rarely a dispute as to whether a defendant has a previous conviction.

For present purposes, the importance of the Fatico cases does not lie in the particular type of evidence in dispute. Rather, they are important because they have come to stand for the proposition that, where the sentence turns on a particular disputed fact, the party asserting the fact has the burden of showing the fact is true by presenting testimony in court subject to cross-examination. Thus, in the Second Circuit the concept of a "sentencing hearing" is recognized.[43] Furthermore, while the Second Circuit recognized that currently the Federal Rules of Evidence do not apply at sentencing, nevertheless a proponent of the use of hearsay must demonstrate need for its use as well as corroboration. 579 F.2d 707, 713 (2nd Cir. 1978).

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[43] The Second Circuit's recent decision in United States v. Lee, ___ F.2d ___, No. 86-1346 (2nd Cir. May 18, 1987), does not dilute the Fatico hearing concept. The court in Lee merely stated that a district court has no duty to conduct a "full-blown evidentiary hearing in each instance where information in a presentence report is challenged." (Emphasis added) However, where the disputed information is critical to the sentence imposed, a "Fatico" hearing is still required. Indeed, in Lee the district court offered to hold a full-blown evidentiary hearing, but the defendant declined the invitation.

In general terms, in its Commentary to the guidelines the Sentencing Commission has endorsed the Fatico approach with respect to disputed guideline factors. Thus, in the Introduction to the guidelines at p. 1.6 (Chapter 1A4(a)), the Commission states:

> The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2nd Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F.Supp. 338 (E.D. N.Y. 1978), aff'd, 603 F.2d 1053 (2nd Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

Furthermore, the Commentary to guideline §6A1.3 (at p. 6.3) states:

> In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

> Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2nd Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law. (Emphasis added)

We applaud the Commission's reference to *Fatico* in the Commentary to guideline §6A1.3. Nevertheless, we believe that §6A1.3 itself, which concerns "Resolution of Disputed Factors", is inadequate. Guideline §6A1.3 reads as follows:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support is probable accuracy.
>
> (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

The difficulty with this provision is that neither it nor the provisions of Rule 32, Federal Rules of Criminal Procedure to which it refers, explicitly contain the Fatico requirements. Indeed, amended Rule 32, effective November 1, 1987, merely gives the defendant "an opportunity to comment" upon the probation officer's determination of the applicable sentencing guideline or other aspects of the presentence report. Furthermore, while Rule 32(c)(3)(A) allows a defendant "to introduce testimony or other information relating to any alleged factual inaccuracy" contained in the presentence report, this opportunity is wholly within the discretion of the district court.

We strongly believe that Rule 32 should be amended to make explicit what the Commentary to §6A1.3 implies: namely, that if there is a dispute about a fact relevant to the sentence which, depending on whether or not the fact was true, would result in one guideline and score rather than another, the fact is to be determined (1) after a hearing, (2) with the parties having the right to present evidence, (3) with the opposing party having the right to cross-examine witnesses, (4) with a requirement that any hearsay evidence presented be corroborated and justified upon a showing of need, and (5) with a requirement that the proponent of a disputed fact be required to establish it by clear and convincing evidence.[44] This standard of proof is particularly important when unadjudicated, uncharged prior misconduct or sentencing factors as subjective as criminal purpose and the likelihood of future criminality are used to aggravate sentences under the guidelines.

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[44] In a separate submission, Federal Defenders will submit to Congress a proposed amended version of Rule 32, Federal Rules of Criminal Procedure, with accompanying commentary.

While precedent in the Second Circuit requires that an evidentiary hearing be held to resolve disputed factors important to sentencing, United States v. Fatico, supra, there is not a comparable requirement in most parts of the country. Thus, a change in the Federal Rules of Criminal Procedure is required. Otherwise, reliance on case law that differs from one district to another will result in a hodgepodge of methods used to determine sentencing factors and, consequently, result in a wide variance in the reliability of information used to determine factors used in sentencing. The absence of uniform fact-finding standards will thwart the Sentencing Commission's efforts to fulfill its assigned role in overseeing and curtailing unwarranted disparity, and it will undermine the reliability of the continuing process of refining and revising guidelines over time. The guidelines can be no more reliable in achieving desired sentencing results than the fact-finding used to apply them.

Although we urge Congress to look to case law, current case law should set the lowest limit of appropriate procedural due process.[45] This is so because current case law has developed

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[45] For example, United States v. Lee, supra, adopts a preponderance of evidence standard of proof for disputed facts at

(Footnote continued on next page)

under a system where the judge may use any sentencing factor he wishes to consider and need not explain reasons. If the judge does nothing except pronounce sentence, his determination is unreviewable by an appellate court. Concern over accurate fact-finding is much reduced in a system in which no one knows what facts are relied upon and in which the relative propriety of different sentences is virtually irrelevant. By contrast, under a guideline sentencing system, the reliability of determination as to the presence and weight of each factor relied upon in sentencing is of the utmost importance. Now that we are to begin to assess in a public manner a relative propriety of sentences in different cases, there is an increased need for sufficient procedural due process to ensure accurate fact-finding in the cases that are to be compared.

The need for an adequate hearing structure to resolve disputed factors that will be used in sentencing can be illustrated by several of the sentencing guideline provisions. Section 5K2.5 directs the court to increase the offense level

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sentencing. However, that standard was adopted under current sentencing practices. As Judge Oakes points out in his concurring opinion in Lee, "we may very well want to hold at some future time in some other context that proof by clear and convincing evidence is required as a matter of policy." The "other context" should be, we submit, objective guideline sentencing. We urge Congress "as a matter of policy" to adopt a clear and convincing standard of proof.

depending on the relative amount of property damage or loss not already taken into account by the substantive offense guideline. If the government claims $55,000 of property damage occurred from a flood caused by a trespasser on federal property, and the trespassing defendant claims the damage was only $3,000, or that the property damage did not result from his trespass, the court could not determine whether to increase at all under §5K2.5 or whether to increase one, three or five levels without holding a hearing to resolve the factual dispute. Or, suppose the guidelines require the court to determine the value of a building destroyed in an arson in order to identify the appropriate guideline level. The government asserts that a $1 million building was destroyed, based on its investigator's assessment. The defendant claims the building destroyed was worth only $100,000, based on its expert's investigation. The court has no means of making the required factual finding without holding an evidentiary hearing at which appropriate witnesses can testify and be cross-examined and/or appropriate documentation introduced. If the court makes a finding based solely on the untested assertions of one side or the other, its finding would be completely arbitrary and could violate due process.[46]

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[46] Similar factual disputes could arise in a host of departure factors such as §5K2.3 (Extreme Psychological Injury), §5K2.2 (Physical Injury), or under §5K2.12 (Coercion and Duress) as to the relative levels of harm or the "imminence" of a physical threat. Even routine calculation of fines will engender disputes over the amount of loss to the victim or gain to the defendant.

Furthermore, numerous factual disputes will undoubtedly arise under §4A1.3. Section 4A1.3 allows the court to aggravate above the guidelines for "prior similar adult criminal conduct not resulting in a criminal conviction" as shown by "reliable information." Also, the court is told in §4A1.3 that it may impose a sentence above the guideline if the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or if there is a likelihood that the defendant will commit other crimes. Where such a broad range of wholly unadjudicated conduct, both criminal and otherwise, as well as predictions of future conduct, are used to carry the defendant above the guidelines in an unlimited fashion, there is an equally unlimited potential for significant factual disputes to arise. These disputes will necessitate, at the very least, resolution at an evidentiary hearing with adequate procedural safeguards. Section 4A1.3 of the guidelines alone opens a proverbial Pandora's box of due process concerns.

The guideline provisions also illustrate the problem of the type and weight of information that may be used in establishing sentencing factors. Section 5K2.9 requires that the court depart from the guidelines to increase the offense level to reflect the fact that the defendant committed the offense of conviction "in order to facilitate or conceal the commission of another offense." A defendant's purpose to facilitate or conceal another offense is difficult to prove directly and would usually have to be established through circumstantial or other evidence, rendering this provision particularly susceptible to abuse. The guidelines give no hint as to what kind of evidence could acceptably be used to establish criminal purpose to insure that the provision is not abused.

A second illustration is §5K2.3 (Extreme Psychological Injury), another fairly subjective factor, which could be established through medical and psychiatric examinations of the victim if the victim is required to submit to court-ordered examinations upon a defense request. However, no such requirement is contained in the guideline. Therefore, psychological injury could presumably also be established simply through the victim's conclusionary or self-serving statements to the probation officers, resulting in a departure from the guidelines.

Finally, as noted above, §4A1.3 allows "reliable information" in establishing prior similar criminal misconduct not resulting in a criminal conviction to move a defendant's sentence above the guideline. Such a loose standard could presumably include multiple hearsay of the most unreliable sort.

Thus, a cursory examination of the sentencing guidelines demonstrates that without an adequate fact-finding and dispute resolution structure, unfair and uneven application will result. If evidentiary hearings are not held when important facts are disputed and inaccurate facts therefore are used in sentencing, there will be no mechanism remaining to correct the factual error and the consequent mistaken application of the guidelines. Rule 35 will no longer be available to adjust an inappropriate sentence. Nor will the Parole Board. Thus, if factual accuracy is not assured through appropriate evidentiary hearings prior to sentencing, the courts will undoubtedly experience a rash of post-conviction habeas corpus proceedings, filed under 28 U.S.C. §2255, claiming unlawful custody due to inaccurate information used to calculate the sentence.

C. Unadjudicated Conduct

Use of unadjudicated conduct to aggravate a sentence is an issue of great concern to Federal Defenders and is intertwined with the issue of procedural due process. A chief problem of any guideline sentencing system is the danger that the guideline factors may be used to sentence a defendant for commission of a crime for which the defendant has not been convicted.

The Sentencing Commission readily concedes that, in large measure, the guidelines take into consideration conduct for which a defendant is neither indicted nor convicted. Thus, in an overview of the guidelines in Chapter One, the Sentencing Commission acknowledges that it has adopted a system that has "a number of real [offense] elements" and depends upon "commonly occurring real offense elements."[47] Chapter 1A4(a) (pp. 1.5-1.6) More explicitly, the Commentary to guideline §1B1.2(b), which formalizes the use of unadjudicated conduct, states:

> In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. In such instances, the court should consider all conduct, circumstances, and injury relevant to the offense (as well as all relevant offender characteristics). See Section 1B1.3 (Relevant Conduct).

The definition of relevant conduct in §1B1.3 includes, among other things, acts or admissions committed, caused, or aided and abetted by the defendant that are part of the same course of conduct or a common scheme or plan as the offense of conviction, or that are relevant to the defendant's state of mind or motive in committing the offense.[48] There is no requirement that any of this conduct or the circumstances be charged and either proved or admitted.

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[47] Real offense sentencing, of course, is a system which basis sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted.

[48] In addition, relevant injury is defined as harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

Thus, "relevant offense conduct" may be used to determine the adjustments in Chapter Three, Part A or in the application of specific offense characteristics, as demonstrated by the Commentary to several substantive offense sections of the guidelines such as drugs (§2D1.4), theft (§2B1.1) and fraud (§2F1.1) to name but a few. Furthermore, unadjudicated conduct is counted in the departure and criminal history provisions of the guidelines. Section 5K2.9, as noted above, directs a court to increase a sentence above the guidelines where the defendant committed the offense of conviction to facilitate or to conceal another offense. Section 5K2.6 requires enhancement for possession or use of a weapon even when resolution of the issue of weapon possession may have been unnecessary to adjudication of the crime itself. Enhancement of a sentence based upon unadjudicated conduct is even more explicit in the Criminal History section. As discussed in our earlier comments, §4A1.3 tells the court that it may increase the sentence to a point anywhere above the guidelines based upon unadjudicated "prior similar adult criminal conduct not resulting in a criminal conviction."

While the guidelines use unadjudicated conduct in a wide variety of circumstances, one modest example demonstrates the danger of misuse. Consider the case where by statute a certain act is a crime and where the same act using a weapon is by statute a more serious crime. In such a case, even if the guidelines would usually require a case to be put in a more or less serious category depending upon whether a weapon was used, we think that the fact that a weapon may have been used should not be considered in the sentencing unless the defendant has been charged with and convicted of -- or admitted to -- the more serious offense.

As it happens, this example applies to the guidelines. Under 18 U.S.C. §2113(a), "simple" bank robbery is punishable by twenty years imprisonment. Aggravated bank robbery, i.e., where, among other things, the offender "puts in jeopardy the life of any person by the use of a dangerous weapon or device", is punishable under 18 U.S.C. §2113(d) by twenty-five years imprisonment. If a weapon is used in a bank robbery, it is now customary for the indictment to charge the crime under §2113(d). However, under the Specific Offense Characteristics for robbery under §2B3.1 of the guidelines, the level of the robbery is increased from 3 to 5 levels depending on the use made of the firearm. Does this mean that, if the prosecutor has some evidence that a weapon was used but possibly not enough to convince a jury beyond a reasonable doubt, he or she can avoid the proof problems by charging the defendant only with simple bank robbery and asking for the enhancement at sentencing? To do so, we submit, is fundamentally contrary to established principles of criminal jurisprudence.

It is our belief that, if Congress, when enacting criminal statutes, thought the "other crime" fact was of such significance that it merited more serious possible punishment, the other crime fact should generally be established the way Congress anticipated -- through adjudication by trial or guilty plea. Any other system would allow a defendant to be sentenced for more serious conduct even though the prosecution's case might not be strong enough to prove the conduct to a jury -- in other words, it would encourage "end runs" around the jury system.

We note that both Washington and Minnesota, which have guideline systems, have dealt with this issue specifically. RCW 9.94A.370 (Washington) states in part:

> In determining any sentence, the trial court may use no more information than is admitted by the plea agreement, and admitted to or acknowledged at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The real facts shall be deemed proven at the evidentiary hearing by a preponderance of the evidence. Real facts that establish elements of a higher crime, a more serious crime, or additional crimes cannot be used to go outside the presumptive sentence range except upon stipulation. (Emphasis added)

Similarly, in State v. Womack, 319 N.W.2d 17, 20 (Minn. 1982), the Minnesota Supreme Court held that, where a defendant disputes the commission of unadjudicated offense conduct, the sentencing court may not act as an independent factfinder in order to justify departure from presumptive sentencing guidelines. In Womack, the defendant was charged with possession of a pistol by a felon, and with assault in the second degree. Pursuant to a plea agreement, the assault charge was dismissed, and the defendant pleaded guilty to possession of the firearm. Throughout the case, the defendant disputed his guilt as to the dismissed assault charge claiming that he had acted in self-defense. At sentencing, the court stated that it did not believe the defendant's claim of self-defense and determined that the defendant had, in fact, committed the assault as alleged. The court imposed a sentence of thirty months confinement. On appeal, the Minnesota Supreme Court reduced the defendant's sentence to the presumptive 16 month term specified by the guidelines.

The crucial factor in Womack was that the defendant disputed his guilt as to the dismissed count. In this circumstance, the Minnesota Supreme court has declared that a defendant does not surrender his right to have a jury determine guilt or innocence.

> It is one thing for the sentencing court to look at the conduct underlying the offense to which the defendant pled guilty if the defendant admits that the underlying conduct occurred, but it is quite another thing when the defendant denies that such conduct occurred. (Emphasis added) Womack, supra.

Unlike Washington and Minnesota, sentencing in federal courts under the guidelines submitted to Congress will be heavily based upon unadjudicated conduct. To the extent that such conduct is "proved" at all at sentencing, a standard of proof and procedural due process far less than that required at trial would be applied under current sentencing procedures. While we oppose use of unadjudicated conduct in principle, we urge Congress to reject the guidelines on broader grounds. We urge rejection because the guidelines are put forth without a recommended structure to achieve procedural due process in sentencing; their pervasive use of unadjudicated conduct is just a glaring example of the unfairness in sentencing that will result from a system which lacks an adequate sentencing hearing structure.

D. Misplaced Role of the Probation Officer

We have dealt above with one inadequacy of new Rule 32, Federal Rules of Criminal Procedure, as it relates to the guidelines. We now deal with another defect in Rule 32 as it relates to the guidelines -- the altogether misplaced role of the probation officer in guideline sentencing. In sum, the new Rule 32 requires probation officers to make findings of fact and conclusions of law (albeit preliminary) -- functions for which probation officers are neither trained nor suited.

Applying the guidelines, including the specific offense characteristics and the Chapter Three adjustments is not simply a matter of checking off whether certain factors apply to the case. Rather, applying the guidelines will in many cases require fact-finding in a formal sense, and require making legal judgments about the proper interpretation of the offense and adjustment criteria.

Under subsection (c)(2)(B) of the new Rule 32, the presentence report is to contain the classification of offense and offender under the guidelines that the probation officer "believes" to be applicable and an "explanation" by the probation officer "of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under the circumstances." New subsection (a)(1) requires the court to "afford" the parties "an opportunity to comment on the probation officer's determination and on other matters relating to the appropriate sentence."

The defect in these provisions of Rule 32 is that the guidelines cannot be applied with the ease that Rule 32 seems to assume. To choose some simple examples:[49]

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[49] These examples also serve to dramatize the need for an adequate hearing structure, as advocated in earlier sections of this Statement.

(1) Arson of a building which is destroyed by the fire may depend on the value of the building. §2K1.4(c)(2). But what expertise does the probation officer have in valuing buildings? What experts does he interview? What theory of valuation does he apply -- market value or replacement cost?

(2) If larceny involved "more than minimal planning" the specific offense characteristics call for an increase of two levels. In many cases, whether planning is minimal or not will not be clear. Probation officers are not qualified to make such judicially binding determinations. How will the probation officer decide who was involved in the planning? Will he seek to talk to codefendants? Or will he rely on information from victims?

(3) The Commentary to §2F1.1 (Offenses involving Fraud or Deceit) states that dollar loss often does not fully capture the harmfulness and seriousness of the conduct, and suggests that in such cases a departure from the guidelines may be appropriate. Is the probation officer to make a judgment about this? Is he to suggest the extent of the departure?

(4) If the defendant's role in the offense was less than average, how is the probation officer to make an assessment of whether the defendant was a minor participant (2 level decrease), or minimal participant (4 level decrease) or in between (3 level decrease). See §3B1.2.

Similar examples occur throughout the guidelines.

Accordingly, we believe that probation officers should not be engaged in guideline fact-finding. The "facts" under the guidelines are by necessity often mixed questions of fact and law, because the guidelines throughout use such words and phrases as "serious", "primary objective", "substantial", "recklessly", "had reason to believe". Furthermore, undoubtedly there will soon be a substantial body of law interpreting the words of the guidelines; and it is too much to expect that probation officers, with a plethora of other duties, can keep upon with rapidly expanding case law. Yet under a complex guideline sentencing system which will generate substantial additional responsibility, judges increasingly will be forced to rely on probation officers.

In 1984 Congress amended Rule 32(a)(1) to coincide with the effective date of the guidelines. However, in attempting to bring Rule 32 into conformity with guideline sentencing, Congress fell short in merely allowing the defendant "an opportunity to comment upon the probation officer's determination" of the applicable guideline or grounds for departure. See Rule 32(a)(1). In light of the expanded role of probation officers, Congress should again amend Rule 32 to provide for a mandatory hearing structure, with full procedural due process, in which the defendant can have meaningful input on the appropriate sentencing guideline or reasons for departure.[50]

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[50] As a supplement to the work of the probation officer, the Rule could provide for what seems to be an appropriate procedure for applying the guidelines in specific cases. Specifically, should not the parties, soon after the verdict or plea, be

(Footnote continued on next page)

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required to meet and thereafter report to the court (a) whether they agree on the applicable guideline factors and, if not, (b) what factors they do agree upon, what factors they do not agree upon, and what factors require an evidentiary hearing? After such a report, the court will be able to proceed directly to the issues.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

COMMITTEE ON ANTITRUST AND TRADE REGULATION

DAVID KLINGSBERG
CHAIR
425 PARK AVENUE
NEW YORK 10022
(212) 836-8261

RICHARD M. STEUER
SECRETARY
425 PARK AVENUE
NEW YORK 10022
(212) 836-8483

October 20, 1987

Hon. Edward M. Kennedy
United States Senate
Russell Senate Office Building
Washington, D.C. 20510

Attn: Caroline Osolinik, Esq.
✓Scott Green, Esq.
Karen Kremer, Esq.
Senate Judiciary Committee

Dear Senator Kennedy:

I am writing in connection with the hearing scheduled for October 22, 1987 in regard to Sentencing Guidelines which we understand will automatically take effect in November in the event that Congress does not act to postpone their implementation.

On behalf of the Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York ("the Committee"), I am writing to request that Congress act to postpone for a short period of time, perhaps nine months, the implementation of the Sentencing Guidelines recently submitted by the United States Sentencing Commission.

This postponement is necessary to provide the Commission with sufficient opportunity to justify the numerous policy decisions incorporated in the Guidelines, and to enable the Congress to perform its necessary oversight function. Without this justification and review, we are concerned that the Guidelines will not receive the support of the bench and bar. A poor beginning may place the very future of the Guidelines process in jeopardy, which would be a sad result after so many years of effort.

As you are aware, the process of drafting the current Guidelines has been far more difficult than originally expected, requiring Congress to amend the original Act to give the Commission an additional year to complete its task. These complex Guidelines have now come to the Congress at a time when Congressional, and particularly Judiciary Committee, attention has been focused on other unusually pressing matters. The limited Congressional hearings which have been held so far have inquired into the impact of the Guidelines on issues of overall importance, such as their effect on court calendars and prison populations, and uniformity in their application. These are vital issues to be sure, but they do not begin to exhaust the range of policy decisions incorporated by the Commission in these Guidelines. In particular, there has been little consideration given to the specifics of individual Guidelines. Such specific focus is essential to determine whether the will of Congress in enacting federal criminal statutes is achieved or thwarted. Without a postponement, we doubt Congress would have sufficient time to identify all the problems raised by individual Guidelines, much less pass corrective legislation.

The Guideline relating to the Sherman Act is a case in point, showing how the process has worked so far and why further Congressional review is so vital. Following the circulation of the Commission's first preliminary draft, our Committee submitted extensive written comments, which we attach as Exhibit A. The Commission then redrafted the initial Guidelines, making some changes in the antitrust provisions. Again, our Committee filed further comments, which we attach as Exhibit B. A final revision was then issued, making some changes and improvements. Neither revision deals adequately with the fundamental problems of policy or implementation that we described.

By way of example, we point to the following significant problems:

(1) Fines: Only in the antitrust area has the Commission promulgated a Guideline for fines. The Commission has asserted, without support, that the "average" excess profit in price-fixing is ten percent of the sales price, and that the corporate fine should be two to five times that amount. This Guideline will result in imposing the maximum statutory fine in almost all price-fixing cases, a result not in accord with the intent of the Congress which enacted this provision of the Sherman Act. As for individuals, the fine required by the Guideline will likewise be the statutory maximum in all but the

smallest cases. As a result, most defendants, corporate or individual, will receive uniform fines even though the circumstances of each case may differ significantly. That result is contrary to the intent of Congress that sentences be proportional.

(2) Prison Terms: The Commission states that prison terms will be "much more common, and usually longer, than is currently typical" and will represent a "substantial change from present practice." With no empirical support, the Commission asserts that this change is warranted because current sentencing practices are ineffective deterrents. This assertion, however, fails to meet the statutory directive in the Sentencing Reform Act itself that imprisonment for first offenders (most antitrust defendants) be imposed only for "a crime of violence or an otherwise serious offense." Without disputing the premise that many antitrust offenses are serious, greater justification is required from the Commission if this major change in current sentencing practice is to be accepted and effectively implemented by the courts. Further, the antitrust Guideline requires imprisonment and fines, again without any justification and contrary to the legislative directive that prison sentences should not be imposed generally on first offenders.

(3) Measure of Responsibility: The Commission measures responsibility solely by the volume of commerce "affected by the violation" which is "attributable to an individual participant." There is no explanation given for this approach, no consideration given to collateral impact on civil litigation, and no definitions given to the key terms, particularly as they apply in a complementary bidding situation. By focusing on dollar values, the Guideline provides no explicit acknowledgment of other factors relevant to responsibility, such as corporate position or ownership interests. Moreover, the general factors subsequently provided, which relate to role in the offense for all offenses (sec. 3B), are too vague to be applied meaningfully and consistently in an antitrust context.

Our brief examination relates to only one Guideline. There is no reason to believe that the lack of justification and explanation stops there, however. Effective review of all the Guidelines is required, and this can be done only by Congress, as the 1984 Act itself envisioned. Regulations issued today by any federal regulatory agency, no matter how trivial, provide more explanation and justification to those who have commented on them and to those who will be affected by them, than the Commission has provided. The Sentencing Guidelines, of course, will have an enormous potential impact. If courts are to accept and understand them, and if the Bar is to be able to use them, further consideration should be undertaken before they are implemented. We respectfully suggest that Congress act now to delay their implementation.

Respectfully,

David Klingsberg

David Klingsberg, Chair
Committee on Antitrust and
Trade Regulation

Burton C. Agata
Joseph Angland
Jack C. Auspitz
Barry J. Brett
Douglas D. Broadwater
John M. Desiderio
Jeanne M. Dutton
Steven Mark Edwards
Harry First
Ernest A. Gleit
Ira G. Greenberg
Stanley M. Grossman
Gerard E. Harper

Thomas R. Long
David H. Marks
Linda S. Miller
Robert Neuner
John Logan O'Donnell
Philip H. Omsberg
James F. Parver
William C. Pelster
James W. Quinn
Yvonne S. Quinn
Benjamin T. Richards, Jr.
Edward M. Shumsky
William Jay Thomashower

Comments on Preliminary Draft of Sentencing Guidelines, United States Sentencing Commission (September 1986)

Committee on Antitrust and Trade Regulation
of The Association of the Bar of the City of New York

Summary of Comments

Pursuant to the Commission's request for public comments on the Preliminary Draft of its Sentencing Guidelines, the Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York has reviewed the Guidelines specifically with regard to antitrust offenses (sections R211, R212). First, the Committee believes that the penalties required under the Guidelines are excessively harsh. Second, it is the Committee's view that, despite the Guidelines' apparent simplicity, their application will raise many questions which neither the Guidelines nor the Commission's Commentary address. Finally, the Committee believes that the Guidelines are not "enforcement neutral," in the sense that they embody the current Administration's enforcement views with regard to the criminality of horizontal price-fixing in contrast to other violations of the Sherman Act.

These comments are divided into four parts. Part I discusses the principal reasons leading to the conclusion that the Guidelines recommended antitrust sentences are excessive and inconsistent with Congressional intent. Part II discusses two representative situations which highlight a number of additional flaws in the logic and potential application of the proposed Guidelines. Part III presents an alternative Guideline for these offenses, consistent with the general approach of the Guidelines, as well as with Congressional intent and existing practice. Finally, Part IV offers comments on broader issues which affect antitrust sentencing, as to which the Commission has requested comments.

I. The Proposed Penalties Are Excessive

The Guidelines propose what is, on its face, a rather simple approach to sentencing in antitrust cases. In Section R211, the Commission proposes for "restrictive pricing or marketing agreements among competitors" that the penalty be keyed to the "dollar-value of commerce." Correlating punishment to the volume of commerce involved presumably accords with two goals of punishment. One is deterrence, on the theory that the greater the dollar value involved, the greater the profitability of the conspiracy, and accordingly the greater the need for punishment to deter the improper conduct. The other is "just desserts," on the theory that the "volume of commerce is a reasonable substitute for gauging the seriousness of the offense" (p.111). Other goals (rehabilitation or protection of the public by incapacitation) are not considered.

The Guidelines require a minimum sentence of two months for even the smallest and, therefore under the Guidelines, least significant conspiracy. In addition, the Guidelines "suggest" large fines (although it is not clear whether the court must impose fines in addition to the jail sentence). The "recommended" fine for an individual defendant is ten per cent of the volume of commerce; for an organization, it is fifty per cent. The fine is intended to be keyed to an "average" price-fixing overcharge of ten per cent. With regard to individuals, the Guidelines currently make no distinction based on ownership or position in the corporation; with regard to organizations, the Guidelines make no distinction based on the size of the corporation as measured by total assets. There is a reduction for being a "minor participant," which appears to be applicable to both individual and corporate defendants (section A314).

A. Prison Sentences for Individuals.

Under present law, as the Commission notes in its Commentary to the proposed Guideline, only 15%, or 1 out of every 7, of individual defendants in antitrust cases is sentenced to imprisonment. Of those actually sentenced to imprisonment, the average time served is less than four months. The proposed Guidelines require a minimum prison sentence of two months for even the smallest cases (less than $1 million of commerce per defendant) and much longer sentences in larger (in terms of commerce involved) cases.

While many criminal antitrust cases brought in the last six years have involved bid-rigging on specific jobs and, therefore, relatively small amounts of commerce, the longer term perspective is far different. The average annual commerce per antitrust indictment during the period 1955-80 was in excess of $160 million, and the estimated total volume of commerce per antitrust case brought after the 1974 amendment to the Sherman Act was $669.61 million in 1981 dollars (2 J. Clabault & M. Block, Sherman Act Indictments, 1955-1980, at 690, 706-707, 718-19 (1981)). The proposed Guidelines emphasize the per-conspirator amount of commerce ("volume of commerce attributable to any one participant"). While there is no similar calculation of this figure, it is not unreasonable to estimate that the "average" conspiracy had between 6 and 10 corporate conspirators. Thus, the average dollar volume of commerce for Sherman Act felony cases from 1974-1980 would exceed $50 million, the highest category under the proposed Guidelines with a base offense value of 30 points. This would result in a sentence of 18-24 months imprisonment for the historical average individual defendant.

The Commission supports its position as follows: "The Commission believes that the best way to deter individuals from committing this type of economic crime is through prison sentences of short to moderate length, coupled with large fines."

While the Commission's Guideline proposals in general have no doubt increased the expected average prison sentence for other crimes, it is doubtful that the impact is as great on any other crime as it is for antitrust violations.

Antitrust sentencing has been the subject of earlier proposals to increase the incidence of incarceration. The Department of Justice has sought to persuade sentencing judges that 6 months of actual imprisonment should be the average sentence. The most detailed statement of this position is found in the U.S. Department of Justice Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act, February 24, 1977, which recommend a base sentence of 18 months for antitrust individual defendants recognizing that, in light of the then-existing parole system, the actual time served in prison would be 6 months.

Since 1977 the Antitrust Division has normally followed the Guidelines for sentencing recommendations. Nonetheless, district judges have rarely concurred. Indeed, the Committee believes that sentencing for violations of Section 1 of the Sherman Act clearly do not present the evil of grossly disparate sentences for the same criminal violation which caused Congress to enact the Sentencing Reform Act of 1984. Rather, antitrust sentences have generally been uniform, although at levels to which the Antitrust Division objects. With the exception of a few plea agreements providing for 1 year imprisonment, the vast bulk of individual antitrust defendants have received little or no actual jail term. Indeed, significant jail sentences have usually been found in cases charging both an antitrust and a Hobbs Act or racketeering violation. (See, e.g., United States v. Bitz, Cr. 159-162 (S.D.N.Y. 1959) (Blue Book No. 1462) (1 year sentences imposed in case alleging price fixing and Hobbs Anti-Racketeering Act violations)).

The Commission supports its dramatic change in sentencing by reference to deterrence. This Committee has no doubt that the Commission can and should give great weight to deterrence of antitrust violations in setting the appropriate Guideline. Yet there is literally no evidence to support the proposition that mandatory sentences of imprisonment are necessary to deter antitrust violations. Nor is there any evidence that the existing sentencing pattern, which includes few actual prison sentences but with the possibility of prison present in each case, does not adequately deter antitrust violations.

To the contrary, this Committee believes that a comparison of criminal antitrust convictions (by plea or after trial) for cases brought during the period 1977-80 with those brought during 1982-85 will reveal that the dollar value of commerce involved in criminal antitrust violations has certainly not increased, and may well have decreased in constant dollars.[1] The current

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[1] A complete comparison is not possible since the Antitrust Division discontinued its practice of stating the amount of commerce involved in most cases. However, for each of the years 1977 through 1980, commerce of at least $1 billion and generally more than $2 billion was the subject of successful criminal prosecution. For at least some of the years 1982 through 1985, the amount of commerce appears to be less than $1 billion.

Administration has pursued a vigorous policy of criminal enforcement against price-fixers and bid-riggers. Thus the empirical record with regard to deterrence does not support the view that an extreme deviation from present practice is warranted.

This Committee respectfully suggests that this factual record rebuts decisively the Commission's belief that mandatory minimum terms of imprisonment, for periods far in excess of the current average even for that 1 out of 7 offenders who has been imprisoned, is necessary for deterring such violations. The existing pattern of sentencing, with the possibility of imprisonment for relatively short periods of time always present, yet relatively infrequent instances of actual imprisonment, seems to have provided an adequate and appropriate amount of deterrence. A sentencing range of 0 to 6 months, which allows the sentencing court to impose no imprisonment or custody or up to a six month term of imprisonment, replicates and may, in practice, provide for more frequent incarceration than in the past. It should, therefore, be sufficient to equal current levels of deterrence, and there is no demonstrable need for added deterrence.

Since mandatory prison sentences are not justified by the only basis cited by the Commission (i.e., deterrence), this Committee believes that the Commission in adopting sentencing Guidelines for antitrust violations should follow the explicit Congressional preference against imprisonment for first-time offenders found in Section 994(j), 28 U.S.C.: "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ."

While antitrust violations may have significant adverse economic effects, horizontal conspiracies should not invariably be considered "an otherwise serious offense," without taking account of the magnitude of the harm involved and the circumstances under which the various defendants acted. It was not until 1974 that Congress saw fit to make it a felony to violate the Sherman Act. Then Congress only provided for a maximum sentence which places it in the lowest category of federal felony, Class E, as measured by the provisions section 3559, 18 U.S.C., which was enacted contemporaneously with the creation of the Sentencing Commission itself. At the same time, Congress set the maximum fine at the highest level for any federal criminal violation, thereby recognizing that fines rather than imprisonment were the normally accepted penalty for criminal antitrust violations.

In sum, this Committee feels that the proposed dramatic change to mandatory imprisonment for all antitrust violations is simply not justified on the factual record and in light of the Congressional purposes for which the Sentencing Reform Act was enacted. Sentencing judges should still retain the authority to impose prison sentences on criminal antitrust violators, but the base offense value should be less than 14 sanction units for antitrust violations. Mandatory imprisonment should be retained, if at all, only for violators who have used bribes, threats or violence to implement an antitrust conspiracy.

B. Corporate Fines.

The recommendation for corporate fines is also flawed. It ignores clear legislative history; it is based on an estimate of damages for which there is no empirical support; and it ignores the undisputed fact of private treble damage actions.

The maximum corporate fine for antitrust violations is among the highest criminal fines available (see, e.g., Preliminary Draft, p. 157). Congress raised the maximum fine to $1 million in 1974, following lengthy review and debate. A number of witnesses recommended that the corporate fine be based on the amount of commerce or profits involved in the particular case. (Hearings on S-782 and S-1088 before the Senate Subcommittee on Antitrust and Monopoly, 93rd Cong., 1st Sess., 138, 174.) Similarly both the House and the Senate reports on the bill recognized that the European Economic Community (Common Market) maximum fine was 10% of the corporate defendant's gross annual sales volume. Nonetheless, the Senate bill provided a fixed dollar limitation of $500,000 which was only raised to $1 million at the request of President Ford after the bill was reported by both the House and Senate Committees.

As clear as the congressional decision that corporate antitrust fines were not to be based exclusively on the amount of commerce involved is the congressional intent that the $1 million fine was to be reserved for the extraordinary violation and not be routinely imposed. Thus, Senator Tunney, the legislation's sponsor, testified in support of the legislation: "The penalty is a ceiling and not a floor. . . . It has been argued that the maximum fine need not be increased when even now it is seldom imposed. Yet, corporations have grown dramatically in size and in power, and, for those corporate giants who must at times be deterred from and punished for illegal conduct, the current maximum fine is wholly inadequate." Hearings on S-782 and S-1088 before Senate Subcommittee on Antitrust and Monopoly, 93rd Cong., 1st Sess. 5 (1973).

Similarly, the then head of the Antitrust Division testified in support of the increased maximum fine that it would not be applied in the average case: "I would stress that it would not be mandatory for the courts to impose the maximum fine. Indeed, courts at present do not often impose even the [then current] maximum fine of $50,000. This judicial restraint is expected to continue." Id. at 96.

The record of actual fine levels reveals that the courts have generally imposed fines consistent with this explicit congressional intent. Expressed in 1981 dollars, the average annual amount of commerce involved in a criminal antitrust case between 1956 and 1980 was $160.77 million, and the estimated total volume of commerce for each of the criminal antitrust conspiracies prosecuted was $1,195.93 million. 2 J. Clabault & M. Block, Sherman Act Indictments, 1955-1980, at 706-7, 712-3 (1981). In the 20 years preceding the enactment of the Antitrust Procedures and Penalties Act, the average corporate fine was $15,531.00, compared with the maximum fine of $50,000. Id. at 700. In the first five years after the Antitrust Procedures and Penalties Act (the only years in which aggregate data is currently available), the average fine was $89,461.70. Id. And for the entire period between 1976 and 1985, the Committee has calculated that the average corporate fine was approximately $137,000.

If the proposed Guideline on corporate fines is actually adopted, there will be a dramatic increase in fines. The $1 million maximum will be reached for each violator with a $2 million volume of commerce subject to the conspiracy. Thus, the maximum fine would be imposed in every case in which the amount of commerce involved was as much as a small percent of the average commerce involved in cases from the period 1955-1980.[2] Such a system, where all but the most trivial violations are subjected to the maximum fine (and where that maximum fine is the highest in the criminal laws), can hardly be described as a modified real offense sentencing proposal. The proposed Guideline treats virtually all corporate offenders the same--the member of an international cartel with $500 million in commerce involved in the conspiracy pays exactly the same fine as the highway paving contractor who receives a total of $2 million in rigged bids.[3] Thus, the proposed Guideline, in effect, does away with grading of antitrust fines, contrary both to Congressional intent and to the Commission's desire to have "modified real offense" sentences which recognize differing levels of culpability.

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[2] As noted at p. 4, above, an estimate of the average volume of commerce per conspirator for criminal cases brought subsequent to 1974 yields at least $50 million in 1981 dollars. Even without any further adjustment to 1986 dollars, the maximum fine would be applicable to conspiracies where the average volume of commerce per conspirator was only 4% of the average of all criminal cases from 1975 to 1980.

A further reason for rejecting the proposed Guideline is found in its reliance on an "estimated" level of "average additional profit attributable to price fixing" of 10% of the selling price coupled with the "low probability of detection." This Committee is unaware of any empirical basis for this estimate of average overcharge. Certainly we are aware of no comprehensive published study to support such a figure. And there are many cases where that figure would be manifestly wrong.

Indeed, any "average" overcharge will conceal a wide range of overcharges. For example, following the indictments and pleas in the Corrugated Container cases, there were numerous treble-damage cases brought. Some of the larger purchasers of corrugated containers pursued the case to trial. The jury found that there had in fact been a nationwide conspiracy to fix the price of corrugated container bids but that the plaintiffs had suffered no damages -- that is, that the price they paid for their corrugated containers was not increased as a result of the conspiracy. Similarly, the conspiracy to eliminate "double coupons" at grocery stores, see p. 28, below, involves substantial volumes of commerce (hundreds of millions of dollars), with relatively minimal overcharge.

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[3] Since the Guideline provides that the dollar volume of commerce is the greater of the volume of commerce actually done by a conspirator or the average volume of commerce done, a bid-rigging conspiracy between two contractors on a $2 million job would result in $2 million of commerce attributable to the winning bidder and $1 million of commerce for the losing bidder. Thus, if the conspirators agreed to split the overcharge, or indeed the entire profit on the job, the "winning" bidder would still be required to pay a fine twice that of the "losing" bidder.

In sum, the proposed Guideline which would require the maximum fine in all but the smallest antitrust cases finds no real-world support in the "estimates" relating to the average percentage overcharge or the probability of detection.

Finally, and perhaps most significantly, the "calculus" upon which the 50% of commerce fine Guideline is apparently based seemingly ignores what Congress clearly viewed as one of the most important parts of antitrust sanctions -- the treble damage remedy. Indeed, there is only the briefest reference to the treble damage remedy in this part of the Commentary.

Congress and the Supreme Court have repeatedly recognized the importance of the treble damage remedy in deterring antitrust violations. See, e.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346, 3358 (1985); American Society of

Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982); Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 262, 266 (1972). Indeed, treble damages have long served as an important inducement for private antitrust plaintiffs to act in the public interest in prosecuting antitrust violations. In 1980, Congress simplified and expedited treble damage actions which follow successful government criminal antitrust prosecutions by amending Section 16(a), 15 U.S.C., to allow collateral estoppel rather than mere prima facie evidentiary effect to the government action. Nor has there even been any recent legislative proposal to limit treble damage recovery in the type of cases for which the Government considers criminal prosecution.

While there is no complete study of private actions following successful government criminal actions, this Committee believes that treble damage actions occur in virtually all, if not all, such cases. Indeed, even when the criminal defendant is acquitted, a private treble damage action may still be pursued based on the possibility that the private litigant can prevail on a "preponderance of the evidence" standard although the government could not establish guilt "beyond a reasonable doubt."

Given the relative certainty of a treble damage action being brought in any case in which the Government obtains a conviction, even if by plea of nolo contendere, the disgorgement of overcharges plus at least some of the "treble" penalty, together with attorneys' fees, cannot be ignored in setting the level of corporate fines, at least if those fines are based on the analysis set out in the Commission's Commentary which appears to rely on a calculation of the necessary level of fines for deterrence while not sufficiently considering what for many is the most important deterrent.

For all of the foregoing reasons, the proposed Guideline for corporate fines is excessive and should be revised. It ignores Congress' intent that the $1 million maximum be reserved for the extraordinary case; it is based on assumptions of overcharge that have no basis in fact; and it ignores in its "calculus" the deterrent effect of treble damages actions.

C. Individual Fines.

For the same reasons that the corporate fines under the proposed Guideline are excessive, the proposed fine for individuals is excessive. The maximum fine of $250,000 would be reached for the individual whose corporate employer's "commerce involved" was $2.5 million. As noted above (p. 4), this is less than 5% of the average commerce involved in antitrust indictments for the period 1955-1980. Yet, for the period between 1976 and 1985, this Committee estimates that the average fine for individual defendants was slightly over $20,000 (or one-fifth of the then statutory maximum fine for individuals).

Moreover, there is a great internal inconsistency to the Guidelines for individuals. Deterrence is the reason given by the Commission for the dramatic increase in jail sentences that are proposed; deterrence is also given as the reason for the dramatic increase in fines. There is no evidence to support the need for a dramatic increase in jail sentences to raise the level of deterrence. There certainly is no evidence simultaneously to increase fines and thereby further increase the level of deterrence. To the extent that individuals will be required to serve any period of incarceration, the Committee believes that the jail sentence is adequate deterrence in itself, and that in the case of an individual, a fine should be seen only as an alternative sentence to incarceration rather than as an additional sentence.

D. Enforcement Neutrality. The Guidelines provide a clearly articulated penalty scheme only for "restrictive pricing or marketing agreements" which involve competitors. Quite clearly, this category does not include illegal activity which involves a purely "vertical" relationship; for example, it would not include a vertical price-fixing agreement. Less clear is whether it would include a manufacturer who participates in a horizontal price-fixing agreement among the manufacturer's dealers. Less clear, as well, is whether a "restrictive marketing agreement" would include an agreement among competitors to boycott certain manufacturers or distributors. Cases which do not fall within the restrictive pricing or marketing agreement category are then consigned to Section R212, which provides only for a range of imprisonment of 0 to 6 months, and makes no provision for fines.

The Committee opposes this division of antitrust violations.[4] First, each of the cases mentioned above which might not fall within the horizontal category has, in fact, been prosecuted criminally under the Sherman Act by other Administrations. Whatever the views of this Administration with regard to the criminality of such behavior, or indeed whatever the views the Commission itself might have with regard to the criminality of such behavior, we do not believe that it is the Commission's role to freeze enforcement patterns along current lines. This is particularly true when one of those lines, vertical price-fixing, is highly controversial, with many in Congress believing that this Administration is improperly failing to enforce a practice which was declared illegal as far back as 1911. A future Administration may very well wish to resume criminal enforcement in this area, enforcement which in fact occurred under the Carter Administration.[5]

Second, drawing such a severe and important line between offenses which fall under Section R211 and those which fall under

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[4] While the Committee recommends that the Guideline for section R211 be changed so as to conform generally to the Guideline for section R212, the following comments are made in the event that the Commission rejects the Committee's proposal.

[5] Moreover, under any Administration, the Department of Justice exercises substantial prosecutorial discretion in the area of the practices covered under Section R212, prosecuting only the most egregious practices which presumably deserve criminal punishment. The Guidelines severely impair that discretion by reducing the range of penalties applicable to such practices.

Section R212 will likely complicate the sentencing process. The distinction will also provide the litigants and the court a way to escape the impact of R211. Thus, at the least, the Commission must endeavor to make clearer which cases it believes fall into which category.

Finally, the Commission justifies this two-category division by stating that the civil system, with private treble damage actions, "may provide sufficient deterrent and remedial effect." This Committee urges great caution in taking account of the efficacy of the treble damage action to act as a deterrent to these non-horizontal violations of the antitrust laws. While the probability, indeed near certainty, of treble damage actions following criminal indictments for horizontal price-fixing requires such actions to be considered in determining the level of fines for such conduct, in the area of vertical restraints, plaintiffs are having much greater difficulty winning such cases (particularly in the distribution area). Further, there is a real possibility that legislation will curtail the private right of action or at least eliminate treble damages for non-horizontal cases. Therefore, it seems singularly inappropriate for the Commission to rely exclusively on the private treble-damage remedy for deterrence of non-horizontal criminal antitrust violations.

II. Other Specific Problems In Application

The Commission has expressed particular interest in having comments directed toward the application of the proposed Guidelines to actual cases. There follows a brief review of some of the most important practical problems in attempting to apply the Guidelines as written, or even if the various penalties are reduced unless all reference to the dollar-volume of commerce is eliminated from the sentencing calculation. Some of these difficulties in applying the proposed antitrust Guidelines are then analyzed by attempting to apply them to fact situations modeled on relatively recent antitrust indictments.

A. Practical Problems

1. Dollar-Value of Commerce: The Guidelines define volume of commerce as "the total volume of commerce done by all conspiring enterprises in the goods or services affected." Minimum punishment for each defendant is based on a principle of "equal apportionment," determined by computing a fraction in which the "total volume of commerce" is the numerator and the number of "participants" is the denominator. If actual sales exceed this amount, then actual sales are the basis for punishment. This formulation poses some obvious questions.

First, what sales are to be included in the "total volume of commerce done by all conspiring enterprises in the goods or services affected"? If the indictment is limited to a single rigged bid or to an all inclusive nationwide price-fixing conspiracy, the answer may be relatively simple. If, however, the indictment involves an international cartel, should the volume of commerce include sales made outside the United States? If it includes only sales within the United States, this may mean that foreign sellers' punishments will be only an "equally apportioned" share of sales made in the United States, although their profit might be substantially higher because they have kept the U.S. firm from making sales outside the United States. If the U.S. firm has been allocated most of the sales in the United States market, its punishment will then be comparatively higher. Similarly, even in the relatively common bid-rigging cases presently constituting the bulk of criminal antitrust indictments, the Government frequently alleges that there were jobs collusively bid other than the specific job serving as the predicate to the indictment. The Guidelines indicate that the entire volume of commerce is to be treated as being covered by the conspiracy, yet the definition of that broader "conspiracy" will rarely be free from dispute, especially where the term of imprisonment of individual defendants is directly correlated to the amount of commerce.

The total volume of commerce is the numerator in the calculation of the volume of commerce attributable to any one participant in the conspiracy. The denominator is, of course, "the number of such participants."

Calculating that number may be raise unforeseen problems in the international context. The Guidelines do not make clear whether in determining the number of firms in the cartel it is proper to count all the firms which are involved in the cartel (even if they made no sales within the United States) or only those firms which have been indicted. All conspirators may not be charged, for a number of different reasons. They may be outside U.S. jurisdiction; or there might be some arrangement whereby a firm is not charged in return for furnishing information to the Government; or there may be some dispute as to whether a particular firm in the industry is actually a co-conspirator.

A similar problem may arise even in the classic bid-rigging or price-fixing indictment. Small or marginal competitors may not have clearly been conspirators. If they are counted in the denominator, the average volume of commerce attributable to the participants will be reduced substantially. The defendant, especially an individual defendant who works for a relatively small conspirator, will have a dramatic incentive to maximize the number of unindicted coconspirators, thereby reducing the dollar-value of commerce and the sanction units. Thus, if unindicted participants are not counted, this may raise the punishment of those who are indicted (taking out the sales of the smallest firms will likely raise the punishments of those remaining). On the other hand, a decision to count "the entire" conspiracy may present difficult problems of proving the identities of all the participants. Indeed, an individual defendant might justifiably insist on a full and fair opportunity to offer evidence as to the involvement of marginal firms, thereby turning the sentencing hearing into a mini-trial. Whichever result the Commission prefers, however, the Guidelines must state clearly how "participants" are to be defined.

We must add, however, that the Commission is correct in rejecting exclusive reference to the amount of commerce actually done by each defendant. Not only would this provide no sentencing guidance for trade associations; it would also eliminate any liability for those conspirators whose "role" in a bid-rigging conspiracy was not to bid, rather than merely putting in an agreed-upon inflated bid.

2. The Charged Defendants: From the point of the view of the corporation, assessing the actual dollar-value of commerce may be relatively unimportant unless the proposed Guideline setting a 50% fine is dramatically reduced. Thus, even a fine of 2% of the commerce involved would have produced a maximum fine where the commerce attributable to a defendant is only $50 million, an average or even modest amount in terms of antitrust indictments prior to 1981. Rather than providing the potential private treble-damage plaintiff with further help on its case, the defendant under even this reduced fine percentage, might well stipulate to a $1 million fine.

Individuals may feel differently. To the extent that corporate employers believe it more prudent to plead and "settle" the case, this may increase the burden placed upon individuals with regard to establishing the correct dollar-value of commerce for the entire conspiracy, which is the key under the proposed Guidelines to how long they will spend in jail. Further, the Guidelines do not provide much in the way of discrimination among various levels of employees. There is an aggravation factor for those who direct or supervise another "in the commission of the offense" (section A312), but it is not clear whether this, in itself, takes account of the level of responsibility which the particular individual has within the corporation. Similarly, there is a mitigation factor "depending upon the offender's relative culpability" as a "minor participant" (section A314), but this does not make clear whether the culpability is to be compared against co-conspirators or can also depend upon the offender's position within the corporation.

The major factor affecting an individual defendant's sentence will be the volume of his or her employer's sales, rather than the defendant's position in the corporation or the extent of actual participation in the conspiracy.[6] This means that employees of the largest corporations will receive the heaviest punishments, without regard either to their actual culpability or the need to fashion a deterrent which takes account of the potential rewards of the illegal behavior to the particular individual. Yet, there is no reason to assume that the rewards are greatest for employees of the largest corporations (they may be greater for employees in smaller firms), and thus there is no reason (on deterrence grounds) to penalize them more severely because they "caused" more damage; such a "causal" analysis could be made with confidence only if one assesses the relative participation of the individual in the conspiracy as well as the harm done by the individual's employer.[7]

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[6] The Guidelines are silent on how a defendant who did not work for a corporation (e.g., the director of a trade association) should be treated.

3. Prior Violations: Without any apparent rationale or justification, the proposed Guidelines treat a prior antitrust conviction much more harshly than are prior convictions treated in all other offenses. The antitrust violator receives 12 additional points for a previous conviction; under Chapter Three, even if the prior conviction resulted in a prison sentence of more than one year, the additional points added to the base offense value for such other crimes would only be 2.

This treatment of prior criminal conviction is particularly troublesome given the fact that it apparently does not require that the conduct for which the present sentence is being imposed have occurred after the prior conviction. Thus, an individual who has responsibility for two offices and engages in price-fixing at both offices may be indicted and convicted of two separate conspiracies. When he is being sentenced for the second violation, he faces an additional year in prison even if both conspiracies dealt with trivial amounts of commerce. The Committee believes that if the Commission intends to impose any significant additional punishment based on a previous antitrust conviction then that conviction must have preceded the conduct for which the defendant is presently being sentenced.

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[7] This problem is far from hypothetical, especially if the terms of imprisonment are reduced but still made dependent on the amount of commerce attributable to the corporate defendants. Thus, in the Corrugated Container criminal cases, a plant general manager of one of the larger national manufacturers, whose operation accounted for less than 10% of his company's total corrugated output, would have received a greater penalty than the president of a smaller, single-plant manufacturer who was at the heart of the conspiracy.

4. The Sentencing Hearing: The Guidelines set out three key facts relevant to all sentencing decisions in antitrust cases: the dollar volume of the total conspiracy; the number of participants; and the volume of sales attributable to each particular defendant. It is possible that in many cases under the proposed Guidelines, given the fact that the maximum corporate fines could be reached quite easily, the corporate defendants will not dispute any of the three issues. Yet, if the level of fines is reduced, as this Committee believes is appropriate, the exact mechanism for determining these facts is unclear. If it is to be embodied in a plea agreement, as the Commission suggests (p.17), then the Commission must presumably make such agreements binding on the sentencing judge in its general policy statement regarding plea agreements. At this point, however, the Commission has left this issue open (see p.166).

On the other hand, resolving these issues by litigation will likely put great strain on the sentencing hearing mechanism, making it unlikely that such a hearing would be "less formal than a trial," as the Commission predicts. For one, there may be some difficult factual issues to resolve at the hearing. More importantly, there is a question of the interrelation between litigation at the sentencing hearing, or even a stipulation to certain facts, and Section 5(a) of the Clayton Act which establishes certain estoppel effects with regard to matters litigated in government antitrust cases. The lack of clarity as to the interaction of facts determined at the sentencing hearing and its subsequent effect on private treble damage litigation might, in itself, impel parties to litigate critical issues at this stage. The possibility of large treble damage recovery in subsequent cases would almost certainly make this hearing a contentious one.

5. Application with Mail Fraud and RICO.

The Antitrust Division has recently begun to add additional counts charging mail fraud or wire fraud to antitrust indictments. While this Committee does not feel it within its ambit to comment generally with respect to mail fraud and wire fraud sentencing, there is reason to be concerned that the Antitrust Division, having failed to persuade sentencing judges that prison sentences are appropriate for antitrust offenses, is seeking to add multiple fraud counts in order to avoid the general sentencing practices. If the Commission agrees with this Committee's recommendation that mandatory prison sentences are not appropriate for all antitrust violations, then it will be necessary for the Commission to consider how to prevent the Antitrust Division from doing an "end-run" around that determination. One alternative might be to provide that the Guidelines found in section F211 will not apply when the fraud count is based on conduct also directly constituting a violation of a federal statute specifically dealing with such conduct; in such a case, the Guideline for that specific statute should be used.

B. Application to Recent Cases.

1. United States v. Wholesale Produce Dealers Assn of Hawaii, Cr. No. 86-00495 (D. Haw. 1986). This indictment charged a conspiracy lasting at least 13 years involving a trade association and some or all of its 30 wholesaler members to fix prices charged by wholesalers on certain items of produce, and to establish suggested or guideline markups for determining the wholesale price of produce. According to the government, total sales of fresh fruit and vegetables exceeded $75 million a year. Any attempt to apply the Guidelines readily illustrates most of the problems discussed above. First, are the entire $75 million of annual sales to be included? If so, then for the entire period covered by the indictment, the amount of commerce would probably approximate $1 billion. If all vegetables and fruits were not covered by the conspiracy, which sales were? Also, were all of the members of the trade association really members of the conspiracy? Also, what share is appropriately allocated to the trade association, which itself made no sales, but which was the only party indicted?

These questions are not answered by the proposed Guideline for corporate fines. Had a member of the association been indicted, it would likely have had far more than $2 million in sales attributed to it, even if it were a member of the conspiracy for only 1 year. Yet this phenomenon reflects the very problem with the Guideline: a defendant with relatively small sales which was a member of the conspiracy for only 1 year pays the same fine as a major force in the conspiracy for all 13 years.[8]

As to potential individual defendants, an employee of the "average" size conspirator would fall in the $25-$50 million category with a base offense value of 24 sanction units. This translates into a sentence of 12 to 18 months; more time in prison than virtually any antitrust defendant has ever served.

2. United States v. Waldbaum, Inc., Cr. No. 84-00348 and 84-00349 (E.D.N.Y. 1984); United States v. Waldbaum, Inc., Cr. No. B-84-50 and B-84-51 (D. Conn. 1984). Waldbaum was named in four indictments returned in two different districts within 3 months of each other. Two distinct sets of practices were challenged. In the New York indictments, Waldbaum and its coconspirators were charged with a conspiracy to stop offering multiple-value coupons on grocery products and meat items. Measuring the commerce involved is difficult; the conspirators' annual gross sales were $1.3 billion; the value of the double

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[8] In fact, the association was fined $125,000 after it pled guilty.

value coupons was approximately $9.1 million. Obviously, from the corporate point of view, the Guidelines require a $1 million fine whether the commerce per defendant was $400 million or $3 million. Had there been any individual defendants, however, there would have been a dramatic difference between perhaps 16-18 sanction points (a minimum sentence of 4 or 6 months) versus 30 sanction points (a minimum sentence of 18 months). Such disparate sentences would seem irrational and contrary to the Commission's goal of uniformity. In any event, in October 1984, Waldbaum pleaded no contest to both indictments and was fined $250,000 on one indictment covering 2 years conduct and $150,000 on the second indictment that covered only 3 months.

The second pair of indictments related to a conspiracy to fix prices of grocery products and meat items in Connecticut and western Massachusetts. Waldbaum was acquitted in one case and pleaded no contest in April 1985 to the second, receiving a $275,000 fine. No individual defendant was named in the indictment to which the no contest plea was entered. Nonetheless, the extreme sanctions found in the proposed Guidelines are most graphically reflected if one assumes that an individual had been indicted and convicted in both conspiracies. Not only would he have faced perhaps as much as 18 months minimum for the indictment in New York; he would have faced a second sentence with commerce attributable to his corporation in excess of $50,000,000 resulting in 30 sanction units as well as an additional 12 sanction units for the previous (by less than 1 year) conviction, even though all of the conduct charged in both sets of indictments took place at approximately the same time. The sentence on this second conviction would, therefore, be 30 to 36 months imprisonment. While no one would deny that the antitrust violations alleged are serious, it is difficult to believe that Congress intended to have such extreme sentences imposed in these circumstances.

III. Suggested Changes in the Guidelines

The Committee makes the following recommendations:

1. Individual Sentences: As indicated by our discussion in Part I, the Committee generally believes that proposed Guideline section R212 should apply to all criminal antitrust cases. This would provide an offense value of 10, leaving the sentencing court free to impose a relatively short period of imprisonment (up to six months) if it feels the specific facts of the case so warrant, yet allowing most individual offenders to be placed on probation consistent with the mandate of Section 994(j), 28 U.S.C. Use of a consistent Guideline for all antitrust violations would also be consistent with the Committee's belief that the proposed distinction found in the Guidelines is simply inappropriate.

In the Committee's view, the base offense value itself provides sufficient sentencing flexibility so that a not insubstantial jail sentence may be imposed on the principal organizer of any conspiracy. If, however, the Commission persists in providing at least a minimum mandatory period of imprisonment for some circumstances, it might consider providing an additional 4 sanction units for the individual who has clearly served as the principal organizer of the conspiracy. The proof on this point may be difficult and the Committee believes that the additional units should be applied only where proof is clear and unequivocal, but the Committee believes that, if the Guidelines are to make distinctions, this may be an appropriate one to make and that the district courts should not find the factual determination required to be insuperable.

There should be additional sanction units added to the base offense value when the conduct charged in the antitrust indictment involved bribery, threats or violence. The Committee believes that an addition of at least 14 sanction units is appropriate.

Finally, there are doubtless cases where a particular defendant has engaged in some extraordinary conduct not covered by any of the above considerations or has shown particular willfulness in his violation of the law. In such cases, the sentencing court is free to impose a sentence greater than that provided for by this Guideline, subject only to review by an appellate court to determine that the aggravating factor is not one covered by this Guideline. Such flexibility seems particularly appropriate in antitrust cases where the variations in industry practices and history make further general provisions difficult to state without thereby leading to anomalous results in cases which will doubtless occur.

Where no jail sentence is imposed an appropriate fine would be up to 25% of the defendant's net worth (up to the statutory maximum of $250,000).[9] We think that such a figure would be sufficiently large to be a "punishment."

Should the Commission maintain its belief that some classes of antitrust cases do warrant mandatory imprisonment, we are unanimous in recommending that the proposed Guideline is excessive, that certainly many antitrust violations do not warrant mandatory imprisonment, and that those violations for which the Commission might require a period of incarceration should appropriately have only a minimal mandatory minimum term in order to satisfy all of the factors upon which sentences are to be based. Thus, as an alternative to the Commission's current proposal, some members of this Committee have devised a more specialized Guideline which would pose less definite questions and which would allow the court to take account of the factual complexities of these cases without forcing clear-cut resolutions of difficult issues. This involves the use of a simple matrix, based on the economic impact of the violation and "degree of responsibility" of the defendant. The former variable is the one emphasized by the current Guidelines. The latter variable is somewhat accounted for as an offender characteristic, but is specified in a way which could exclude weighing the relative culpability of various corporations or employees at different levels in the corporate hierarchy.

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[9] This figure was suggested in the Justice Department's Antitrust Sentencing Guidelines, issued in 1977, as a limit on personal fines.

The proposed matrix would still bound discretion, but the categories are stated in a less rigid way. Rather than trying to forecast in the Guidelines and Commentary all aspects of judgment, these categories might allow a "common law" of sentencing to emerge in this area, as judges articulate the reasons for placing defendants in each category. The proposed matrix is:

		Economic Impact	
		Low	High
Responsibility	Low	10	12
	High	12	14

The low/low outcome on the matrix does not require a jail sentence, and the high/high outcome has an eight-month maximum. Even if a mandatory jail sentence is appropriate in certain categories of cases, the large increase in required jail sentences contemplated by the proposed Guidelines will inevitably lead courts to find ways around applying the Guidelines requirements. Accordingly, in the matrix we have scaled back the penalties so that they will not exceed the effective maximum which could be imposed under the Sherman Act today (in a parole system).

We note that allowing for the possibility of no imprisonment would make the Guidelines more consistent with the requirement in Section 994(j), which states that the Guidelines should reflect the "general appropriateness" of a sentence "other than imprisonment" for first offenders who have not been convicted of "an otherwise serious offense."

2. Corporate Fines: The Committee notes that the Commission has not generally dealt with the issue of fines, except in the antitrust area. Yet, assuming that the Commission believes a Guideline is appropriate at least in this area, the Committee recommends a base fine of 1.5% of the first $3 million of commerce that was subject to the conspiracy, 1% of the next $7 million, 0.3% of commerce in up to $100 million, and 0.1% of commerce in excess of $100 million. Basing the fine on the total dollar volume of commerce subject to the conspiratorial conduct avoids the difficult questions as to the participation of minor alleged conspirators and attributing commerce to specific conspirators. The degree of involvement can be reflected by two adjustments. For corporations whose management was at the heart of the conspiracy, an additional 0.25% factor would be appropriate. For those corporations who were marginal participants in the conspiracy, a reduction of up to 0.25% could be made. Also, a corporation which proves by a preponderance of the evidence that it withdrew from the conspiracy would have a

fine based only on that amount of commerce attributable to the time in which it was a participant in the conspiracy. Finally, reflecting the seriousness of the violation and the evident importance of a significant fine in the congressional view of antitrust penalties, the minimum fine should be the lesser of $50,000 or 10% of the corporation's net worth. This would assure that in even relatively small violations, the large corporation's fine would exceed the maximum fine level prior to 1974. The Commission should also provide that in all cases the maximum fine should not exceed 10% of the net worth of the corporation. Competition is not served by substantially impairing the future competitive ability of a conspirator.

This recommendation bases the corporate fine imposed on the overall impact of the conspiracy on the economy and the relative role of each participant in the formation and maintenance of the conspiracy, rather than relying only on the amount of commerce attributable to each corporate defendant. Corporate size should play some role in the amount of the fine. Indeed the Sentencing Reform Act itself requires the court to consider "the size of the organization" when imposing a corporate fine (section 3572, 18 U.S.C.). But that factor should not be given too much importance lest the actions of a low-level manager of a division of a large, multi-divisional company inevitably lead to the maximum fine.

Applying these principles may be difficult in certain cases. We note that when Congress raised the maximum fine to $1 million, the average amount of commerce in an antitrust case was $505.91

million (Id. at 716-17); thus, Congress imposed a maximum fine that was 0.2% of the average amount of commerce in prior cases. Following the enactment of the increased Sherman Act fines in 1974, the fine per $1,000 of estimated total commerce in the conspiracy averaged $14.43 (or 1.443%) for the period 1975-1980 (2 Clabault and Block, Sherman Act Indictments, 1955-1980, at 736-37). Yet, that figure is an average, thereby attributing equal weight to small cases, in which a higher percentage fine is necessary in order to avoid a trivial penalty, and the largest cases, in which a small percentage fine still approaches the maximum. The proposed scaling of the fine percentage is appropriate to insure that the small cases do not result in trivial fines while the maximum fines are reserved for the largest or most extreme cases. Even then, however, the maximum fine would apply to each defendant in a conspiracy involving $715 million in commerce, far below the largest cases historically.

As an alternative, the Commission could consider basing the fine on a percentage of overall corporate sales or assets of the particular defendant, using a matrix reflecting relative responsibility for the violation and increasing with overall economic impact. By using the "size of the offender" as the base for the fine, the cost of the violation would be more apparent at the time the corporation engages in the improper behavior, thereby perhaps providing a more certain deterrent. Similarly, the goal of retribution might be improved by this matrix since an equal dollar fine against a multinational corporation and a small road paver does not seem equivalent; the "hurt" of the punishment may be too light for the former, and too heavy for the latter. We note that the Sentencing Reform Act itself requires the court to consider "the size of the organization" when imposing a corporate fine. (Section 3572, 18 U.S.C.). A possible matrix would be as follows:

		Economic Impact	
		Low	High
Responsibility	Low	.1%*	.25%
	High	.2%	.5%

(*The percentage specified is the highest yearly value of the corporation's sales or assets during the period of the illegal behavior.)

As an intermediate alternative, there is the use of the same type of matrix focusing in part on overall corporate size, but also on the size of that portion of the corporation which engaged in the illegal acts.

3. Mail Fraud and RICO: Following the Commission's "modified real offense sentencing system," the Committee recommends that where the illegal antitrust conduct involves bids submitted to a governmental entity under an open, competitive bidding system, such behavior be treated as a specific offense characteristic carrying an additional offense value of two

points. We believe that illegal anticompetitive behavior which also implicates governmental processes is more serious than other anticompetitive behavior, all other factors being equal. We do not believe, however, that such anticompetitive behavior is so qualitatively different from other anticompetitive behavior that it would, in itself, warrant the stiff additional penalties which are potentially available (and required under the Guidelines if a conviction is obtained under these statutes). We would propose adding these points without regard to whether a charge of Mail Fraud was (or was not) brought.

There may very well be cases, however, in which the Mail Fraud or RICO charges are based on conduct outside an agreement to fix prices, although the conduct is likewise aimed at obtaining business from the government. An example, drawn from recent bid-rigging prosecutions, would be the bribery of local governmental officials. Such charges should not be considered as a special offense characteristic, but should be handled as a separate matter under the Guidelines for the offense charged.

4. Cooperation with the Government: There is no doubt that cooperation with the government must be taken account of, both from the point of view of government enforcement efforts and from the point of view of just desserts theory. Currently, such cooperation is accounted for either by not charging a particular defendant with a crime, by granting statutory immunity, or by entering into a plea agreement/sentence recommendation in exchange for such cooperation. Whether this system could

continue to operate under the Guidelines depends, in large part, on what the Commission decides to do with regard to plea bargaining.

We would prefer leaving the system of cooperation as it exists currently, and making proper provision for such agreements in the plea bargaining Guidelines. We believe that the Antitrust Division, under this system, has sufficiently strong incentives for hard bargaining so that it is unlikely it will give away "too much" in exchange for cooperation and information. We note, however, that Sections B331-B333, in the antitrust context, are likely to produce disputes rather than uniformity, particularly given the lack of definition for some of the key terms, such as "truthful and significant information" or "active assistance." In any event, were the Commission to adopt such Guidelines, they should not require certification from the United States Attorney. The U.S. Attorney is generally not involved in antitrust investigations, and so would have no proper place in making such a certification. The proper party would be the Assistant Attorney General in charge of the Antitrust Division.

IV. Broader Issues

There are a number of broader issues which are significant for criminal antitrust prosecutions, but which the Commission has not yet addressed.

1. Corporate Probation: In its invitation for comments on the question of organizational sanctions, the Commission suggests only two bases for approaching the question of organizational sanctions--just punishment and deterrence/compensation. Given the penalty structures already proposed by the Commission in the antitrust area, or even the ones recommended by this Committee, it would seem that both rationales are sufficiently served by the corporate fines proposed (which are likely to quickly approach the statutory maximum of $1 million) and by the imposition of jail sentences for the individuals involved.[10] Accordingly, we would propose that the Commission give thought to the rehabilitative goal of the criminal sanction, a goal which seems particularly plausible in the context of organizational, rather than personal, sanctions. Without offering specific suggestions, such probationary conditions might look primarily to putting into place organizational procedures which could help insure that the violation does not recur. A possible way to determine what sort of organizational changes should be made would be to appoint an outside "probation officer" who could conduct an internal antitrust audit of the corporation. Such audits, of course, are not novel, and are currently being done by counsel concerned not

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[10] On p.165 the Commission suggests larger fines in antitrust cases where the government is the victim because the government can collect only single damages. Not only has the Reagan Administration proposed changing the law to provide treble-damages for the federal government; state and local governments currently can sue for treble-damages. Also, the federal government can pursue claims for substantial damages under the False Claims Act.

only with antitrust defenses, but with a whole range of other potentially illegal corporate practices as well. Since the ultimate goal of this form of probation would be rehabilitative, we believe that "community service" (which generally takes the form of financial donations to charity) would be inappropriate. We note, however, that a court should carefully consider the intrusion and cost of such a remedy before imposing it. Obviously, what would be required is a special antitrust audit officer or counsel whose cost would be passed on to the corporate defendant. A skilled individual would require significant compensation, plus perhaps a support staff. This would be an annual cost for the term of the probation. Thus, we would not expect that such a procedure would be employed as a matter of course, but only when the court determines that it is truly required.

2. Debarment: The Commission has requested comment on the use of debarment as a term of probation. Such a term could be imposed on a corporation if "appropriate" [18 U.S.C. 3563(b)-(20)]. For antitrust cases, however, this sanction may be unnecessary. The federal government, and many state governments, have regulations in effect which will bar bidding by those convicted of antitrust offenses. The problem in this area, in fact, has been that debarment procedures often sweep too broadly, with firms debarred from bidding in such a way that competition may be adversely affected. Indeed, one of the difficulties in

imposing this sanction is that the final competitive impact of a debarment order in the marketplace may be difficult for a federal judge to predict, and may have widely different impact on different defendants who have actually engaged in the same behavior. Further, a debarment would strip the government agencies or private purchasers of the ability to obtain goods or services from what may be a uniquely qualified potential seller. These judgments are best left to the potential purchasers.

Section 3563(b)(6) specifically provides that an individual could be barred from a specific occupation, business, or profession as a condition of probation. Although this is a very drastic provision, it cannot be said that such a probationary condition would never be warranted in an antitrust case. We would suggest that this sanction be used cautiously, however, perhaps only after an audit report so recommends.

3. Compliance Programs: Under Section 3572, in determining the amount of a corporate fine, the court is directed to consider disciplinary measures and measures designed to insure against a recurrence of illegality. Many corporations today actually do have "compliance programs" in effect to help insure against corporate wrongdoing; the existence of such programs has also been asserted by corporations as a defense in a number of

corporate criminal prosecutions.[11] Although we believe it would be a good idea, and consistent with the Act, to encourage the adoption of such programs, we would also be concerned that too ready an acceptance of these programs by the courts could provide an easy way to moderate corporate fines. If the convicted corporate defendant had a compliance program in place, it was, by definition, one which has failed; if the defendant has adopted such a program only after the illegality occurred, it will be difficult to determine whether the program will be pursued vigorously. Thus, if the Commission does include this factor in its fines guidelines, we would suggest that judges be cautioned to view it with skepticism, and that it should only provide a very moderate reduction in the required fine.

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[11] While such programs have rarely proved sufficient to persuade a jury that the corporate defendant should be acquitted, the Mead Corporation compliance program was offered as one of the significant defenses in Mead's successful criminal defense in the Corrugated Container litigation. In contrast, Mead lost the subsequent civil trial, perhaps reflecting the true importance that the compliance program had on the criminal jury.

In conclusion, the Committee urges the Commission to reconsider the proposed Guidelines for sentencing for antitrust violations. The existing sentencing patterns have provided effective deterrence and should not be discarded without reason. Certainly, the vast increase in the number and duration of jail sentences is not justified. Similarly, the level of corporate fines should be reconsidered in order to comply with the congressional intent that the maximum fine not become in effect the average fine.

December 1, 1986

Respectfully submitted,

David Klingsberg, Chairman

Bertram C. Agata
Joseph Angland
Terence H. Benbow
James W. Bowers
Raymond Brenner
Douglas D. Broadwater*
John M. Desiderio
Steven Mark Edwards
Harry First*
Ira G. Greenberg
Stanley M. Grossman
Allen S. Joslyn
Lewis A. Kaplan
Thomas R. Long

David H. Marks*
Bartlett H. McGuire
Linda Miller
Robert Neuner
John Logan O'Donnell
Philip H. Omsberg
William C. Pelster
Yvonne S. Quinn
Craig Schiller
George Vadenburg
Clark E. Walter
Bonnie G. Wittner
Kimba M. Wood

* Members of the Subcommittee that prepared this report.

COMMENTS ON REVISED DRAFT OF SENTENCING GUIDELINES UNITED STATES SENTENCING COMMISSION (FEBRUARY 1987)

Committee on Antitrust and Trade Regulation
of the Association of the Bar of the City of New York

Summary of Comments

The Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York has reviewed the Revised Draft of the Sentencing Guidelines with regard to antitrust offenses (sections R211, R212) and, pursuant to the request by the United States Sentencing Commission for critical analysis, submits its public comments. Although the Revised Guidelines represent an improvement over the Preliminary Draft Guidelines issued in September 1986, the Committee believes that further changes are needed to make the Guidelines more practical, equitable, and consistent with Congressional intent in the context of antitrust violations.

First, the Committee believes that the penalties required under the Revised Guidelines are excessively harsh, although less so than the penalties required under the Preliminary Draft Guidelines. Second, it is the Committee's view that the Revised Guidelines fail to address several factual situations adequately, resulting in either inadequate or inappropriate, and in one specific area seriously inconsistent, guidance to the sentencing court. Lastly, the Committee believes that the Revised Guidelines, like the Preliminary Draft Guidelines, are not "enforcement neutral," in the sense that they embody the current Administration's enforcement views with regard to the criminality of horizontal price-fixing relative to other violations of the Sherman Act.

In the public comments it submitted on the Preliminary Draft Guidelines, the Committee stated its opinion that the result of the Preliminary Draft Guidelines would be imposition of prison sentences for individual antitrust offenders which greatly exceeded the current average prison sentence and routine imposition of the statutory maximum fines for individual and corporate offenders of the antitrust laws. The Committee contended that antitrust sentences resulting from the Preliminary Draft Guidelines were inconsistent with the intent of Congress. First, application of the Preliminary Draft Guidelines resulted in the routine imposition of prison sentences on first time antitrust offenders despite the intent of Congress, reflected in the same bill that authorized the creation of the Commission itself, that imprisonment was inappropriate for first offenders who had not committed a "crime of violence or an otherwise serious offense." 28 U.S.C. §994(j).[1] Second, routine imposition of maximum fines for corporate antitrust violators conflicted with Congress' intent when it established the current maximum fine for antitrust violations. The legislative intent of the law establishing the current statutory maximum fine was that the new maximum fine was to be imposed only in exceptional cases. Hearings on S-782 and S-1088 before Senate Subcommittee on Antitrust and Monopoly, 93d Cong., 1st Sess. 5, 96 (1973) (remarks of Sen. Tunney and Ass't. Attorney General Kauper). It appears from the Revised Guidelines that the Commission will be urging Congress to change on policy grounds its legislative intent regarding the appropriateness of harsh criminal antitrust sanctions. The Committee, therefore, will express any opinions it may have about the propriety vel non of more severe antitrust sanctions to Congress at the appropriate time. We only note at this time that the record upon which the Commission has based its decision to increase substantially the likelihood of imprisonment from the present figure of 20% is meager at best.

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[1] The same legislation made it clear that an antitrust violation was not an "otherwise serious offense" because in 18 U.S.C. §3559 it categorized

1. Imprisonment for Individual Defendants

The Revised Guidelines have basically retained the commerce-based test employed by the Preliminary Draft

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antitrust violations in the least serious category, Class E, of federal felonies.

Guidelines[2] and the length of sentences for particular levels of commerce, without taking into account adjustments, remain largely unchanged except at the highest levels as demonstrated in the table below:

Volume of Commerce	Sentence Months Revised Draft	Sentence Months Preliminary Draft
500,000	2-8	2-8
1,000,000	2-8	4-10
2,000,000	4-10	4-10
4,000,000	4-10	6-12
5,000,000	6-12	6-12
11,000,000	6-12	8-14
15,000,000	6-12	8-14
20,000,000	8-14	8-14
30,000,000	8-14	12-18
50,000,000	8-14	12-18
100,000,000	10-16	18-24

The Committee endorses the reduction in the clearly excessive minimum sentences found in the Preliminary Draft. The Revised Guidelines also provide somewhat more flexibility to the sentencing court in making adjustments, a result the Committee considers salutary. For example, where the volume of commerce attributable to a particular defendant is at the maximum level (over $50,000,000), a sentencing judge who has decided that the defendant has sincerely accepted responsibility for the crime and is deserving of the maximum adjustment to the base sentence on this ground can, under the Revised Guidelines, sentence the defendant to a term of community confinement or home detention for four to six months.[3] Under the Preliminary Draft Guidelines, this mitigating factor would only have reduced the defendant's sentence from a minimum jail term of 18 months to a minimum jail term of 12 months. The provisions of §Z214, regarding minor participants, provide even greater flexibility. The Committee believes that such flexibility is desirable and permits the appearance of substantial jail sentences for deterrence purposes while allowing room for less harsh sentences in appropriate cases. In sum, while the Committee still believes that the Guidelines are excessive in appearing to mandate imprisonment for virtually all but the smallest antitrust violations, the flexibility available to the sentencing court mitigates the inappropriateness of such a reversal of the generally accepted sentencing practices for antitrust violations.

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[2] The Revised Draft Guidelines, like the Preliminary Draft Guidelines, delineate relatively fine gradations of commerce which will probably cause corporate defendants to contest vigorously the government's proof at the sentencing hearing regarding the amount of commerce impacted by the violation. The Committee believes broader gradations of commerce would obviate or lessen the risk that the sentencing hearing would become a mini-trial on the issue of the volume of commerce involved.

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[3] Under §R211, the offense level would be 12, corresponding to a sentence of 8-14 months, without adjustment. The offense level would be reduced by 3 to a level of 9, corresponding to a sentence of 4-10 months, due to the adjustment under §C321 for acceptance of responsibility. Because the minimum sentence in the Guideline range is less than six months, the court can sentence the defendant to home detention or community confinement under §A521(c).

2. Fines

The Revised Guidelines provide for fines for individuals in the amount of 4 to 10 percent of the amount of commerce but not less than $20,000 which is adjusted upward by $1,500 for each month of imprisonment and $50 to $300 for each month of probation supervision under section A542(i). Fines for corporate offenders are 20 to 50 percent of the volume of commerce but not less than $100,000. The Committee believes that these formulas will result in the imposition of the statutory maximum fine in the majority of every type of case but bid rigging cases. As a result, fines will in most cases cease to be a meaningful gauge of severity of the crime (although, for individuals, prison sentences will serve that function).

The Revised Guidelines define "volume of commerce" as the volume of commerce "done by [the defendant] or his principal in the goods or services that are the subject of the offense." As demonstrated by the Committee in its comments on the Preliminary Draft Guidelines, the average dollar volume of commerce done by each conspirator in criminal Sherman Act cases during the period 1974 to 1980 was probably in excess of $50 million. The Committee is of the opinion that this average has fallen somewhat since 1980 but is certainly above $5 million, the level at which the maximum corporate fine must be imposed under the Revised Guidelines, and above the $6.25 million level at which the maximum individual fine must be imposed under the Revised Guidelines.

Assuming arguendo (and contrary to the clear intent of Congress in increasing the maximum fine to $1 million in 1974) that large fines are necessary for deterrence, the Committee finds a sentencing scheme which results in the imposition of the maximum fine in average cases to be unwise. Such a sentencing scheme creates the impression that the fine is simply a uniform "license fee" to commit antitrust violations even though, as a practical matter, ensuing treble damage actions may serve to punish the corporate offenders to a degree proportionate with the offense. Moreover, the failure of these fines to be proportional to the offense except in instances involving the smallest amounts of commerce may even raise issues under the Eighth Amendment. See Solem v. Helm, 463 U.S. 277 (1983).

Further, by employing a formula which results in imposition of the maximum fine in the great majority of cases, the Revised Guidelines remove any discretion from the sentencing judge. In the great majority of cases there will be no opportunity for the judge to modify the fine to take into account individual factors such as corporate recidivism, major participant, or minor participant, because in most cases both the maximum and minimum fine levels will exceed the statutory maximum fines.

The Committee is also troubled by the purported theoretical rationale for corporate antitrust fines. The commentary to section R211 indicates that the commission appears to believe the estimate of Assistant Attorney General Ginsburg that "price fixing typically results in price increases of at least 10 percent." Statement of Douglas H. Ginsburg Before The United States Sentencing Commission, July 15, 1986, Dep't of Justice Release at 9. The Committee knows of no empirical evidence to support this assertion and is aware of several government studies which contradict it. *See, e.g.* D. Lean, J. Ogur & R. Rodgers, *Competition and Collusion in Electrical Equipment Markets: An Economic Assessment* 74-75 (F.T.C. Bureau of Economics Staff Report, July 1982) (studying eight major electrical equipment lines which were the subject of price fixing in the electrical equipment conspiracies of the 1950's and 1960's and concluding the price fixing resulted in an average overcharge of 2.02%). Although the Committee has no comprehensive evidence as to what the average illegal overcharge is in all industries, it believes that the *ipse dixit* of the Assistant Attorney General that the overcharges are "typically" ten percent is a slender reed on which to rest the Commission's formula for determining corporate fines.[4]

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[4] The commentary to section R212 suggests that the recommended corporate fine, together with treble damages, represents an amount substantially in excess of the illegal profits obtained from the violation which is justified "because of the

3. Definitional and Application Problems

The Committee is also concerned that the "volume of commerce" test employed by the Revised Guidelines may provide insufficient guidance in the areas of inchoate offenses, bid rigging, and international commerce. A criminal violation of the antitrust laws occurs even when competitors agree to fix prices or allocate markets but never implement that agreement. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26, n 59 (1940); United States v. Nash, 229 U.S. 373, 378 (1913); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977). If the volume of commerce is the volume of commerce that is actually affected by a violation, the sentence should be the minimum sentences provided by the Revised Guidelines, a result the Committee believes is appropriate. The phrase "the subject of the violation" can be interpreted, however, to mean the amount of commerce the defendants intended the violation to impact, whether or not the illegal agreement was implemented. The Committee believes the phrase "the subject of the

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difficulty in identifying violators." This suggests that the Commission believes that the probability of detection ranges from approximately 12 percent to 20 percent. The Committee knows of no support for this belief and is concerned that the Commission's apparent justification for higher corporate fines may be unsupportable on the basis of empirical evidence.

violation" should be changed to "actually affected by the violation."

The Revised Guidelines also need clarification in the context of international cartels, where domestic and foreign commerce may be involved. If a defendant has sold goods, domestically and abroad, the Revised Guidelines should make it clear that goods imported into or exported from the United States should be included with the affected domestic commerce in the "volume of commerce," but goods manufactured and sold abroad should be excluded.

In bid rigging cases, it not infrequently occurs that a defendant agrees to submit high bids to permit a competitor to win a bid but does not win any projects through the bid rigging activities. In such cases, the "volume of commerce" for that defendant would be nothing and the defendant would get the minimum fine. This result is proper where the defendant obtains no benefit from the illegal wrongdoing but appears to the Committee to be inappropriate where the defendant receives monetary compensation in the form of pay-offs for his participation. In that instance, the Committee believes that the amount of commerce should be "defined" as the amount which is five times the amount of the pay-offs in order to be at least somewhat consistent with the principle of the Revised Guidelines that corporate fines should at least equal the illegal profits obtained from the violation (that is, if five times the pay-off is the "amount of commerce," then a fine of 20% of the "amount of commerce would provide for a fine equal to the amount of the pay-off).

The Revised Guidelines make an individual responsible for all of the volume of commerce affected by his employer even though the individual is not responsible for the entire volume of commerce. While this result may well not be appropriate where an individual defendant is a local office manager of a corporate defendant engaged in a national conspiracy, it seems equally inappropriate for employees who terminate their employment with the corporate defendant before the conspiracy is over. For example, if a corporate defendant participates in a conspiracy affecting twelve million dollars of commerce annually for five years, but the individual employee defendant terminates his employment after the first year, the individual will receive the maximum fine and a prison term of 10 to 16 months whereas his sentence would be only 6 to 12 months if the commerce affected during the period of his employment were considered.[5] The Committee believes the individual defendant should have volumes of commerce attributed to him which were impacted during the period of his employment with a corporate defendant.

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[5] In either event, the individual defendant would receive the maximum statutory fine, even if he withdrew from the conspiracy out of misgivings over the illegal activity. If the individual defendant organized the conspiracy, section Z211 allows the court to make significant upward adjustments.

4. Internally Inconsistent Treatment of Multiple Conspiracies

Certainly one of the most troubling problems in the Revised Guidelines in the inconsistent treatment for multiple conspiracies. Indeed, the Revised Guidelines provide a substantial incentive for prosecutors to carve up broad conspiracies into separate conspiracies, pushing the double jeopardy clause of the Fifth Amendment as far as possible.

Thus, section R211 states that "[w]hen multiple counts or conspiracies are involved , the volume of commerce should be treated cumulatively to determine a single, combined offense level." The Committee believes that this is, indeed, the correct method for the Guidelines to deal with the difficult question of whether local bid-rigging conspiracies to various customers are part of one conspiracy or are separate conspiracies. The total amount of commerce subject to the various local conspiracies should be cumulated to determine the volume of commerce.

The inconsistency arises when separate indictments are brought on the various customers affected by the local conspiracies and a conviction on the conspiracy to rig bids to the first customer is treated as a "prior sentence" under section A312, even though the conduct upon which the second (or indeed third) indictment is based was fully contemporaneous with the conduct in the first indictment, but merely dealing with a different purchaser.

This is far from a theoretical issue. The Antitrust Division of the Department of Justice has obtained a number of indictments for bid-rigging on electrical construction projects in the Philadelphia area and at least one individual was indicted twice.[6] Since the overall scope of the conspiracy is to be taken into account in the first sentencing judge's determination of the amount of commerce, it appears to be inappropriate at the least to require a subsequent sentencing judge to increase the prescribed sentence on a second indictment on the basis of the "prior sentence." Thus, the Committee believes that conduct that is geographically and temporally related to a prior indictment should not be subject to increase for a prior sentence on the prior indictment even if the two indictments do not constitute double jeopardy.

5. Dichotomy Between Horizontal and Other Violations

The Committee is concerned that the Commission has perpetuated the dichotomy between horizontal price fixing and market allocation offenses governed by section R211 and other antitrust offenses under section R212. Historically, the Antitrust Division has brought criminal cases which would be governed by section R212 only in cases of most egregious conduct. Yet, by severely limiting the range of sentences available for vertical and certain horizontal restraints the Guidelines may deter prosecutors from bringing cases in these areas for even the most aggravated violation. In that regard, the Revised Guidelines are not enforcement neutral. The Committee believes it would be preferable to establish a base offense level for all antitrust offenses using the commerce levels in section R211 but permitting a reduction of 1 to 7 offense levels for conduct other than horizontal price fixing and market allocation.

---

[6] Mr. Pinney was first indicted for conspiring to rig bids on work for U.S. Steel in the Philadelphia region. He was sentenced by Judge Pollack for that violation following a plea. That same day, a second indictment was returned alleging that Pinney engaged in a conspiracy to rig bids to Gulf Oil in the Philadelphia area. Judge McGlynn found that the second indictment violated Mr. Pinney's double jeopardy rights, but the Third Circuit reversed over a strong dissent by Judge Adams and reinstated the indictment, even though many of the conspirators were the same and the time periods overlapped.

6. Plea Bargains

Finally, the Committee believes that, at least in the area of antitrust offenses, the Revised Guidelines have taken the proper approach to the treatment of plea bargains. Antitrust crimes are generally expensive to prosecute and the Antitrust Division should be allowed flexibility for the most efficient allocation of its scarce resources. Moreover, the Committee believes that as long as prosecutors have prosecutorial discretion to bring a case, they should not lose that flexibility once an indictment is returned.

Conclusion

In conclusion, the Committee is disappointed that the Commission has decided to increase the average penalties for antitrust crimes over existing practice without any proof that increases are necessary for the purposes of punishment or deterrence. The Committee is also concerned that the apparent rationale for the sentencing formula for horizontal price fixing and market allocation is based on unsubstantiated assumptions about average illegal overcharges and the risk of detection. The Committee believes, however, that the Revised Guidelines represent an improvement over the Preliminary Draft Guidelines and that with some additional refinements the Revised Guidelines will provide a workable scheme for establishing antitrust penalties.

March 16, 1987

Respectfully submitted,

David Klingsberg, Chair

Bertram C. Agata
Joseph Angland
Terence H. Benbow
James W. Bowers
Raymond Brenner
Douglas D. Broadwater*
John M. Desiderio
Steven Mark Edwards
Harry First*
Ira G. Greenberg
Stanley M. Grossman
Allen S. Joslyn
Lewis A. Kaplan
Thomas R. Long

David H. Marks*
Bartlett H. McGuire
Linda Miller
Robert Neuner
John Logan O'Donnell
Philip H. Omsberg
William C. Pelster
Yvonne S. Quinn
Craig Schiller
George Vadenburg
Clark E. Walter
Bonnie G. Wittner
Kimba M. Wood

* Members of the Subcommittee that prepared this report.

ADDENDUM

Several additional issues were raised and identified by Committee members too late in the process to obtain Committee approval for inclusion in the Committee's comments. For the benefit of the Commission, these issues are presented in this Addendum. These issues represent the thoughts of individual members of the Committee, rather than the consensus of the Committee as a whole.

The issues in this Addendum relate to the practical consequences of a commerce-based sentencing scheme for antitrust violations. One member of the Committee noted that bid rigging cases raise the same problems with regard to individual jail sentences and fines as they raise for corporate fines. This individual suggested that, where a company participates in bid-rigging but does not win any projects, individuals employed by that company should receive the minimum fines and jail sentences unless pay-offs were involved. If the company received a pay-off for its participation in bid rigging, it was suggested that the individuals who are employed by that company, as well as the company itself (see pp. 10-11 of Committee's Comments), should be deemed to have a volume of commerce equal to five times the amount of the pay-offs.

The second, and final, issue raised by individual members of the Committee was that in certain situations, parties will be involved in antitrust violations affecting lines and levels of commerce in which they do not participate. For example, a trade association may participate in price-fixing by its members or a manufacturer not integrated into distribution may facilitate horizontal price-fixing by its distributors. In these particular instances, one member of the Committee suggests, it would be inappropriate to impose minimum sentences. The member suggests that a possible solution may be to attribute a volume of commerce to these entities equal to the largest volume of commerce of the individual companies found to have participated in the line and level of commerce affected by the violation.

GAO

United States General Accounting Office
Report to the Congress

September 1987

SENTENCING GUIDELINES

Potential Impact on the Federal Criminal Justice System

GAO/GGD-87-111

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GAO

United States
General Accounting Office
Washington, D.C. 20548

Comptroller General
of the United States

B-215590

September 10, 1987

President of the Senate and Speaker
of the House of Representatives

The Comprehensive Crime Control Act of 1984 (Public Law 98-473, dated October 12, 1984) made several significant changes to the federal criminal justice system. One of the most significant changes required by the law was the establishment of the United States Sentencing Commission. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system, including detailed guidelines for federal judges to use to sentence offenders convicted of federal crimes. The guidelines are intended to reduce unwarranted sentencing disparities among offenders with similar criminal records who commit similar crimes.

On April 13, 1987, the Sentencing Commission submitted its proposed guidelines to Congress, and they are scheduled to go into effect on November 1, 1987. Section 235 of the law requires that within 150 days after the Sentencing Commission submits its proposed guidelines to Congress, we report to Congress on the potential impact of the guidelines on the federal criminal justice system. Also, the House and Senate Committees on the Judiciary requested that we examine the Sentencing Commission's basis for requesting a 9-month delay in implementation of the guidelines.

To satisfy our objectives, we interviewed various officials from the judiciary, Department of Justice, and other groups concerned with the federal criminal justice system and reviewed the Sentencing Commission's analyses of increases in future prison populations and how much the guidelines will contribute to those increases. The results of our review are summarized in this letter and discussed in detail in the appendix as are the details of our objectives, scope, and methodology.

Although the Sentencing Commission believes that the population of federal prisons will increase significantly over the next 10 to 15 years, it believes the sentencing guidelines will contribute a relatively small amount to the overall population growth. The Commission's prison population analyses appear to be reasonable. But, how much future federal prison populations will actually grow, and how much the guidelines will contribute to that growth cannot be determined. Factors, such as changes in future prosecution and enforcement policies and practices, the extent of the use and nature of plea agreements, and the extent that judges depart from the guidelines in sentencing offenders will affect the growth in prison populations and the workload of the courts.

From our interviews, it seems widely accepted that the guidelines will result in increased workloads for virtually all components of the criminal justice system. However, the full impact of the guidelines will become clear only when there is empirical evidence on how they are implemented.

The Commission requested that implementation of the guidelines be delayed to allow time for field testing them and training personnel. The Commission is proceeding as if the guidelines will be implemented as scheduled on November 1, 1987. Although there are pros and cons on the delay issue, there are no clear cut answers to the question of whether or not to delay implementation.

The Subcommittee on Criminal Justice, House Committee on the Judiciary, recently held hearings on the constitutionality of the Sentencing Commission and its sentencing guidelines. The witnesses believed the constitutionality of the guidelines would probably be challenged.

We did not obtain official agency comments on this report due to the tight reporting deadline specified in Public Law 98-473. However, we discussed the results of our work with officials from the Sentencing Commission, the judiciary, and the Department of Justice who generally agreed that our information was accurate. Their comments were considered in preparing the final report.

We are sending copies of this report to the Chairman, United States Sentencing Commission; the Chief Justice of the United States; the Chairmen of the Judicial Conference's Committee on the Administration of the Probation System and Ad Hoc Committee on Sentencing Guidelines; the Director, Administrative Office of the United States Courts; the Director, Federal Judicial Center; the Attorney General; and other interested parties.

Charles A. Bowsher

Charles A. Bowsher
Comptroller General
of the United States

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Abbreviation

FPS	Federal Prison System

Appendix I

Sentencing Guidelines: Potential Impact on the Federal Criminal Justice System

Background

Public Law 98-473 established the Sentencing Commission as an independent agency within the judicial branch. The Commission is composed of seven voting and two nonvoting members. As required by law, the Commission submitted its proposed guidelines to Congress on April 13, 1987. The guidelines were approved by six of the commissioners, with one commissioner dissenting. The one commissioner dissented generally because he did not believe the guidelines would reduce unwarranted sentencing disparities. The guidelines go into effect on November 1, 1987, unless legislation is enacted to delay or stop their implementation. In submitting the guidelines, the Commission recommended that Congress delay their implementation for 9 months—from November 1, 1987, to August 1, 1988. The Commission wants the additional time to field test the guidelines, train personnel, and propose any necessary amendments to the guidelines before they go into effect.

In accordance with the law, the guidelines limit the sentencing ranges for offenders with similar criminal records who commit similar crimes. However, the law and the guidelines allow judges to depart from those ranges if they believe that aggravating or mitigating circumstances justify departures. In such cases, judges must state their reasons for departure.

The law also expands the authority of the United States Courts of Appeals (circuit courts) to review sentences. Both the defendant and the government can appeal a sentence that is imposed in violation of law or that is a result of an incorrect application of the guidelines. In addition, the law permits the defendant to appeal an above-guidelines sentence, and the government to appeal a below-guidelines sentence. Under the guidelines system, parole (conditional release of offenders before completion of their original prison sentences) will not exist.

Five years after implementation of the guidelines, the United States Parole Commission is scheduled to be abolished. In the interim, it will continue to make parole release decisions for offenders sentenced under the present system. Section 236 of the law requires us to submit another report to Congress 6 months before the scheduled abolishment of the Parole Commission. The report is to address the actual impact of the guidelines system compared to the operations of the previous sentencing and parole release system and is to be used by Congress to determine whether the guidelines system has been effective, whether changes are needed, and whether parole should be retained in some form.

Section 994(g) of Public Law 98-473 directs the Sentencing Commission to estimate the impact of its sentencing guidelines on the population of federal prisons. Also, this section of the law requires that the Commission make recommendations to Congress concerning any change or expansion in the nature or capacity of federal correctional facilities and services as a result of the guidelines. In a June 18, 1987, report to Congress entitled Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, the Commission estimated dramatic increases in future federal prison populations. However, the Commission has not determined the number and types of facilities and services needed to house the increased prison populations, although it has begun work in this area.

Objectives, Scope, and Methodology

Section 235 of Public Law 98-473 requires us to report to Congress on the potential impact of the sentencing guidelines compared to the operation of the current sentencing and parole release system. The report is due within 150 days after the Commission submits its guidelines (by September 10, 1987). Also, the House and Senate Judiciary Committees requested that we examine the rationale for the Commission's request for a 9-month delay in the implementation of the guidelines.

We assembled a panel of five experts to advise us on our audit approach. The panel consisted of two circuit court judges, a clerk of court for a federal court of appeals, a state sentencing guidelines agency director, and an expert on prison population forecasting.

We conducted our audit work from January 1986 to August 1987. We attended the regional public hearings conducted by the Commission, examined testimony and written comments from groups and individuals, and reviewed early drafts of the guidelines as well as the version submitted to Congress on April 13, 1987. In addition, to determine the potential impact of the guidelines on the workload of federal court personnel, we reviewed the Report of the Proceedings of the Judicial Conference of the United States held in Washington, D.C., March 12-13, 1986, Special Session June 30, 1986, and September 18-19, 1986; and the Annual Report of the Director of the Administrative Office of the United States Courts, 1986. We also reviewed statements submitted by witnesses at congressional hearings that were held during 1987 on the sentencing guidelines. It was not within the scope of our review to consider the overall advisability of the guidelines and therefore, we are taking no position on them.

Our review was performed in accordance with generally accepted government auditing standards. However, because of time constraints, we did not make a complete verification of the computer model and data used by the Commission to estimate the impact of the guidelines on future prison populations.

Prison Impact

To address the potential impact of the guidelines on the population of federal prisons we reviewed (1) the Commission's June 18, 1987, report to Congress which contains a summary of the Commission's prison impact study; (2) a draft of its technical report being prepared to further explain the methodology for its study; and (3) related documentation.

To estimate the impact of its guidelines on future federal prison populations, the Commission developed a computer simulation model and applied the model to a sample of about 10,500 offenders who were convicted during fiscal year 1985. In order to meet the congressionally mandated reporting requirement, we did not have time to perform a complete reliability assessment of the Commission's model and data. However, we did perform some limited tests of the model and sample data, and had two of our advisory panel members who are experts in sentencing guidelines and prison population forecasting provide us with an assessment of the Commission's study. These experts reviewed the methods utilized by the Commission staff in their impact study.

We reviewed the computer programs used in the Commission's model on a test basis to check for logic or computation deficiencies and to verify the assumptions built into the model. We also verified the sentence computations of the impact model using a sample of drug cases drawn from the data used by the Commission in developing its projections. On a judgmentally selected basis, we recomputed the Commission's prison population projections using its data and model.

The Commission's development of guidelines and prison population estimates relied heavily on data supplied by other agencies. In addition, the Commission conducted an extensive data collection effort to augment existing data on federal sentencing and release practices. We interviewed the Commission members, their staff, and outside agency officials assisting the Commission, regarding the controls used to verify the model and the accuracy of the data used in the model. We then analyzed these controls to assist us in our review. The Commission could not provide written documentation of the application of these controls to its model; therefore, we could not assess their quality. However, we interviewed Commission officials for details on their quality controls. In addition, we reviewed the Commission's documentation of its sample data selection and analyses.

We interviewed Commission officials responsible for preparing the impact study and Federal Prison System (FPS) officials responsible for estimating future federal prison populations and preparing building plans for federal prisons.

Other Impacts and the Delay Issue

To address the potential impact of the guidelines on other components of the federal criminal justice system and the Commission's rationale for the 9-month delay in implementation, we interviewed 26 knowledgeable persons associated with groups or agencies who will be most affected by the guidelines, such as court officials, defense attorneys, and prosecutors. These persons were not selected using procedures that would ensure against bias. We selected these individuals because we believed they were part of a limited number of people who had detailed knowledge of the guidelines at the time of our review and based on our advisory panel's observation that they were likely to be knowledgeable and have differing perspectives.

We interviewed all seven voting and two nonvoting members of the Sentencing Commission and key staff. We also interviewed officials representing sentencing guidelines agencies from four states (Florida, Minnesota, Pennsylvania, and Washington) concerning their experiences in implementing sentencing guidelines. Further, we examined testimony and written comments of groups and individuals who commented on various versions of the guidelines.

Finally, we reviewed the Sentencing Commission's plans for field testing the guidelines and the Federal Judicial Center's plans for training court personnel in the use of sentencing guidelines. We also observed the Commission's 2-day testing session of the guidelines by probation officers held in Washington, D.C., on July 13 and 14, 1987.

Impact of the Guidelines on the Population of the Federal Prison System

The Commission believes that its sentencing guidelines will have a minimal effect on future prison populations. However, the Commission expects there will be significant growth in the population of federal prisons over the next 10 to 15 years primarily because of the mandatory minimum penalties required by the Anti-Drug Abuse Act of 1986, increases in federal prosecutions and convictions, and increased sentences required by the career offender provisions of the Comprehensive Crime Control Act of 1984.

Between 1970 and 1986, the federal prison population increased about 85.7 percent, with periods of sharp increases occurring from 1975 to 1978 and 1980 to 1986. From 1978 to 1980, a decrease in prosecutions/convictions contributed to a sharp decline in the federal prison population. The changes in the prison population are highlighted below.

- In fiscal year 1970 the average daily population was about 21,000.
- In 1975 the population was about 23,000 and grew to about 30,000 in 1978, a 30.4 percent increase over 3 years.
- The population dropped from 30,000 in 1978 to about 24,000 in 1980, a 20.0 percent drop in 2 years.
- The population grew from about 24,000 in 1980 to about 39,000 in 1986, a 62.5 percent increase over 6 years.
- FPS estimates that the average daily population for 1987 will be 42,000, a 7.7 percent increase in 1 year.

As of July 2, 1987, FPS reported that 43,507 inmates were in federal prisons. This was 15,581 (about 56 percent) more than the system's design capacity of 27,926. An additional 5,031 prisoners were housed in contract facilities.

FPS officials said that overcrowding is the principal issue facing federal prisons. Prison overcrowding increases the likelihood of violence and puts the staff in greater danger. It also results in inmates being housed in less than generally acceptable conditions and makes providing efficient and effective operations and programs more difficult. To address the overcrowding problem, FPS plans to build more prisons and expand the capacities of some existing facilities.

Section 994(g) of Public Law 98-473 directs the Sentencing Commission to estimate the impact of its sentencing guidelines on the federal prison population. This section of the law also requires that the Commission make recommendations to Congress concerning any change or expansion in the nature or capacity of federal correctional facilities and services as a result of the guidelines. On June 18, 1987, the Commission provided a supplementary report to Congress that contained a summary of its prison impact study estimating dramatic increases in the future federal prison population. However, the Commission has not determined the number or types of facilities that would be needed to house the increased prison population, although it has begun work in this area.

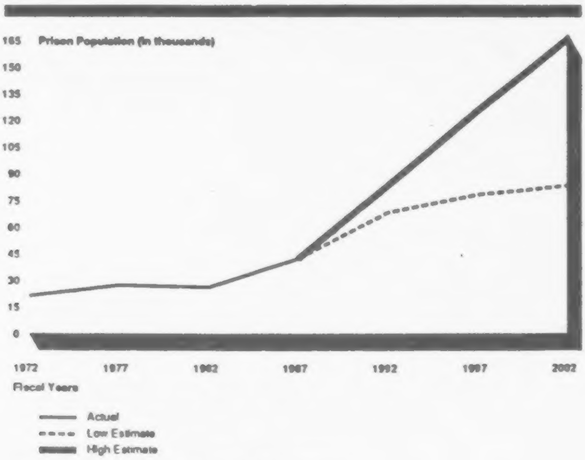
The Commission's study pointed out the problems inherent in forecasting prison populations, including the absence of reliable methods for predicting future crime rates and changes in federal prosecution and enforcement priorities. The study also noted that uncertainties about sentencing under the guidelines made forecasting the effects of the guidelines on prison populations especially difficult. For example, the study pointed out that the proportion of convicted defendants who plead guilty (about 86 percent during the 12-month period ending June 30, 1986) could change under the guidelines, which could affect the sentences they receive. For example, the longer sentences under the guidelines may provide more or less incentive for guilty pleas. Similarly, the authority of judges to depart from the guidelines (even though they must provide a written explanation) creates uncertainty about the ultimate impact of the guidelines.

After pointing out the unknowns concerning the effect of the guidelines on future prison populations, the study explains how the Commission estimated this impact. Generally, the Commission analyzed sentencing practices for a sample of about 10,500 offenders who were convicted during fiscal year 1985. Then, working with FPS, the Commission developed a computer simulation model to project future prison populations on the basis of a variety of factors, including: (1) current practice; (2) anticipated prosecution trends; (3) the Anti-Drug Abuse Act of 1986 (which requires, among other things, mandatory minimum sentences for certain drug offenders); (4) the career offender provisions of the Comprehensive Crime Control Act of 1984 (which require, among other things, prison terms at or near the maximum prescribed by law for certain repeat offenders); and (5) the guidelines.

Because future prosecution policy cannot be anticipated, the Commission projected prison populations for 1992, 1997, and 2002 using various assumptions concerning prosecution/conviction rates, plea negotiation practices, and the extent that judges would depart from sentences recommended in the guidelines. The Commission believes that the federal prison population will continue to grow. The Commission's prison population estimates range from 67,000 to 83,000 for 1992;

78,000 to 125,000 for 1997; and 83,000 to 165,000 for 2002.[1] Compared to the 42,000 inmates estimated for 1987, these estimates translate into increases that range from about 60 to 98 percent for 1992, 86 to 198 percent for 1997, and 98 to 293 percent for 2002. Figure I.1 illustrates the Commission's estimated prison population growth.[2]

Figure I.1: Growth in Prison Population From 1972 to 2002



Source: Federal Prison System and U.S. Sentencing Commission.

All figures for 1987 and beyond are estimates based on the U.S. Sentencing Commission prison population projections.

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[1] The Commission believes its 1992 estimates are the most accurate, its 1997 estimates are somewhat less accurate, and its 2002 estimates are very speculative.

[2] In testimony before the House Judiciary's Subcommittee on Criminal Justice on July 29, 1987, one of the Commissioners testified that the Commission's prison population increases are likely to occur less rapidly than projected. This is generally because the Commission's projections were based on the guidelines being applied to all offenders sentenced after November 1, 1987, regardless of when the crime was committed. However, it is likely that the guidelines will apply only to offenders who commit offenses after November 1, 1987.

The Commission's estimates indicate that the population of federal prisons will increase dramatically because convictions will increase; sentences that do not include confinement (probationary sentences) will be reduced significantly; and the average time served for drug related, violent, and repeat offenses will increase substantially. According to the Commission's study, the use of probation without any confinement will decrease under the guidelines for all nine offense types that it analyzed. Table I.1 shows the Commission's estimates of changes in probation under the guidelines.

Table I.1: Comparison of the Percentage of Defendants Receiving Probation Without Confinement by Offense Type

Offense type	Under current practice	Under guidelines	Difference
Person offenses[a]	31.4	14.6	−16.8
Robbery	18.0	3.0	−15.0
Burglary and trespass	64.0	43.0	−21.0
Property offenses[b]	60.1	33.1	−27.0
Drugs	20.8	5.1	−15.7
Fraud	59.0	24.0	−35.0
Income tax	57.0	3.0	−54.0
Firearms	37.0	9.0	−28.0
Immigration	41.0	30.0	−11.0

[a] Person offenses include homicide, assault, rape, and kidnapping.

[b] Property offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

In addition, the Commission estimates that the use of probation with some form of confinement will increase under the guidelines for six of the nine offense types analyzed. Table I.2 shows this information.

Table I.2: Comparison of the Percentage of Defendants Receiving Probation With Confinement by Offense Type

Offense type	Under current practice	Under guidelines	Difference
Person offenses[a]	10.0	10.8	+ 0.8
Robbery	8.0	2.0	– 6.0
Burglary and trespass	10.0	2.0	– 8.0
Property offenses[b]	15.2	35.6	+ 20.4
Drugs	13.0	8.2	– 4.8
Fraud	18.0	41.0	+ 23.0
Income tax	25.0	56.0	+ 31.0
Firearms	15.0	33.0	+ 18.0
Immigration	27.0	36.0	+ 9.0

[a] Person offenses include homicide, assault, rape, and kidnapping.

[b] Property offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

Further, the Commission estimates that the average time served for seven of the nine offense types will increase under the guidelines. Table I.3 compares the time served under current practice and projected time served under the new drug law, the career offender provisions, and the guidelines.

Table I.3: Comparison of Time Served (In Months)Under Current Practice With Projected Time to Be Served by Offense Type

		Average Imprisonment Time[a]		
		Future practice		
Offense type	Current practice	Drug law	Career offender	Guidelines
Robbery	44.8	•	74.1	75.4
Person offenses[b]	37.7	•	53.3	75.2
Drugs	23.1	48.1	56.8	57.7
Firearms	14.1	•	•	15.2
Burglary and trespass	7.7	•	9.1	16.5
Fraud	7.0	•	•	8.0
Property offenses[c]	6.8	•	•	6.5
Immigration	5.7	•	•	5.2
Income tax	5.5	•	•	11.9

[a] Average time served is based on sentences for all offenders. Offenders not sentenced to imprisonment are treated as having zero months imprisonment. The average time served reported in the drug law and career offender columns is for all offenders, not only offenders subject to the new drug law and the career offender provisions.

[b] Person offenses include homicide, assault, rape, and kidnapping.

[c] Property offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

The Commission believes that the most significant factors contributing to future prison population increases will be growth in the number of prosecutions and the mandatory minimum sentences required by the new anti-drug law. The Commission attributes some of the growth to the longer sentences required under the career offender provisions of the Comprehensive Crime Control Act. It attributes a relatively modest amount of the increased prison population to the guidelines themselves. Under the Commission's various prison population estimates for 1992, 1997, and 2002, the most the sentencing guidelines will contribute to the overall growth in prison populations from 1987 is about 18.5 percent for 1992, 9.8 percent for 1997, and 7.6 percent for 2002.

Table I.4 shows the extent that the Commission believes each of these factors will contribute to the overall growth in the federal prison population from 1987 to 1997 under two of its scenarios.[3]

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[3] These two scenarios contain estimates that fall between the Commission's lowest and highest estimates for 1997. Also, these are the two basic scenarios that the Commission discusses extensively in its study.

Table I.4: Factors Contributing to Overall Growth in Prison Populations 1987 to 1997

	Scenario # 1		Scenario # 2	
Factor	Estimated number	(Percent)	Estimated Number	(Percent)
Growth due to increased prosecutions	+ 19,000	(38.0)	+ 36,000	(47.4
Growth due to anti-drug law	+ 24,000	(48.0)	+ 30,000	(39.5
Growth due to career offender law	+ 4,000	(8.0)	+ 6,000	(7.9
Growth due to guidelines	+ 3,000	(6.0)	+ 4,000	(5.3
Total growth	**+ 50,000**	**(100.0)**	**+ 76,000**	**(100.0**
Plus 1987 population	+ 42,000		+ 42,000	
Total 1997 population	**92,000**		**118,000**	

[a]Does not add to 100 due to rounding.

While the Commission estimates that only a relatively small part of the overall growth in prison populations will be attributable to its guidelines, the Commission's estimates indicate that the guidelines will contribute more to the increased prison populations of certain nondrug offenders (primarily burglary, fraud, and income tax offenders). Table I.5 illustrates this for the Commission's two basic scenarios.

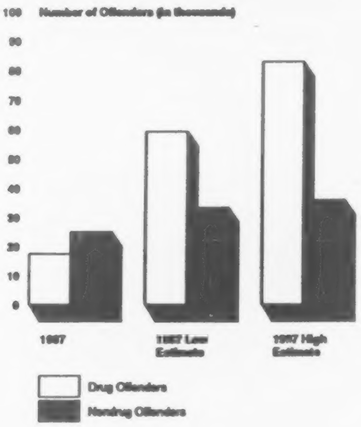
Table I.5: Factors Contributing to Growth in Nondrug Prison Populations 1987 to 1997

	Scenario # 1		Scenario # 2	
Factor	Estimated number	(Percent)	Estimated number	(Percent
Growth due to increased prosecutions	+ 4,000	(50.0)	+ 6,000	(54.5
Growth due to antidrug law	0	(0)	0	(0
Growth due to career offender law	+ 2,000	(25.0)	+ 2,000	(18.2
Growth due to guidelines	+ 2,000	(25.0)	+ 3,000	(27.3
Total growth in nondrug offenders	**+ 8,000**	**(100.0)**	**+ 11,000**	**(100.0**
Plus growth in drug offenders	+ 42,000		+ 66,000	
Plus 1987 population	+ 42,000		+ 42,000	
Total 1997 population	**92,000**		**119,000[a]**	

[a]Total does not agree with table I 4 due to rounding

The Commission's increased sentences for certain nondrug offenses do not significantly affect its overall prison population estimates. This is because the Commission estimates that the proportion of drug offenders, who are currently the largest offender group in federal prisons (about 41 percent according to the Commission's 1987 estimates), will continue to grow. For example, under its two basic scenarios, the Commission estimates that by 1997, drug offenders will constitute about 64.0 to 69.7 percent of all prisoners, an increase of about 56.1 to 70.0 percent. Figure I.2 illustrates the change in the proportion of drug and nondrug offenders in the federal prison population from 1987 to 1997 under the Commission's two basic scenarios. If the actual increase in the drug offender population is not as large as the Commission's estimates, the guidelines will contribute proportionately more to the overall increase in the federal prison population.

Figure I.2: Comparison Between 1987 and 1997 Prison Populations—Drug Versus Nondrug Offenders



Source: U.S. Sentencing Commission

A FPS official told us that FPS staff worked closely with the Sentencing Commission in developing the Commission's prison population projection model. While recognizing the inherent difficulties of all prison population projection methodologies, this official said the Commission's range of estimates and their underlying assumptions are reasonable. He added that it is highly probable that FPS will eventually use the Commission's model, with possible modifications, to estimate future prison populations.

Our review of the Commission's prison impact study methodology, assumptions, and results included sufficient tests to allow us to form an opinion that the Commission's projections were reasonable. However, even a more in-depth analysis would not change the uncertainty of projecting future prison populations.

Estimated Cost of Increased Prison Space

Before the Commission submitted its proposed guidelines and prison impact estimates to Congress, FPS had planned to add 16 new prisons and expand the capacity of 38 (about 81 percent) of the existing 47 correctional facilities at a cost of about $900 million. FPS estimated that its prison population would be 55,200 by fiscal year 1993, and that it would have an overcrowding rate of about 20 percent (which calculates to a base capacity of 46,000). However, that estimate did not include the additional prison space that will be needed because of the Anti-Drug Abuse Act of 1986, the career offender provisions of the Comprehensive Crime Control Act of 1984, or the sentencing guidelines. As part of the Department of Justice's fiscal year 1989 budget submission, FPS is updating its prison population estimates and prison construction plans. These estimates and plans, however, will not be available for review until the President's 1989 budget is submitted to Congress.

In an effort to estimate the potential cost of new prisons, we used FPS' April 1987 cost estimates for new minimum/medium security correctional facilities. These estimates show an average cost per bed of about $66,000. We applied that cost figure to the difference between the Sentencing Commission's estimated population and the approximate 34,500 bed capacity that has been funded by Congress (current capacity of about 28,000 beds plus about 6,500 beds in process) to obtain a rough estimate of the cost to build new facilities for the additional prisoners.

Using the Commission's previously discussed 1997 estimates of 92,000 and 118,000, FPS would need space for 57,500 to 83,500 additional prisoners at a cost of about $3.8 to $5.5 billion to totally eliminate overcrowding. To achieve a 20-percent overcrowding rate, which is FPS' goal, FPS would need 42,200 to 63,800 more spaces at a cost of about $2.8 to

$4.2 billion. Using the Commission's lowest and highest population estimates for 1997 of 78,000 and 125,000 to achieve a 20-percent overcrowding rate, FPS would need 30,500 to 69,700 more spaces at a cost of about $2.0 to $4.6 billion.

These estimates do not include factors for future inflation. Also, the costs could be higher if FPS has to build proportionately more maximum security facilities, which are more expensive than medium or minimum security facilities. Similarly, costs would be lower if proportionately more minimum security facilities were built. Further, the costs could be reduced to the extent that FPS can avoid constructing new prisons by using lesser cost alternatives, such as (1) expanding the capacity of existing federal prisons, (2) placing more offenders in state and local correctional facilities, (3) making greater use of halfway houses, or (4) acquiring facilities no longer needed for their original purpose. FPS officials believe the first two alternatives will not provide much relief because they are already expanding existing facilities to the maximum extent possible and because state and local facilities are currently overcrowded. The extent that alternatives (3) and (4) can be used is unknown. Any need not met by these four alternatives would most likely have to be satisfied by new construction.

Besides the money needed to provide additional prison space, a greatly expanded prison population would substantially increase the funds needed by FPS to operate and maintain its prisons and to provide for inmate custody, care, and rehabilitation programs. For fiscal year 1986, FPS' operating costs averaged about $13,100 per inmate. Using that figure and ignoring any inflation or productivity improvements, FPS could need additional operating funds of as much as $650 million to $1 billion annually to house the additional 50,000 to 76,000 prisoners that the Sentencing Commission estimates for 1997 under its two basic scenarios. For the Commission's lowest and highest population estimates, FPS' additional operating funds needed for 1997 would range from about $470 million to $1.1 billion.

Potential Impact of Sentencing Guidelines on Court and Court-Related Personnel

The Sentencing Commission was not required to estimate the potential impact of its sentencing guidelines on the workload of the federal courts and court-related personnel including district and circuit court judges, probation officers, defense attorneys, prosecutors, magistrates, court reporters, and U.S. Marshals. In addition, neither the judicial branch nor the Department of Justice have developed estimates of the budgetary impact of the sentencing guidelines. However, the Judicial Conference of the United States (the policy-making body of the judiciary), members of the judiciary that have testified at congressional hearings, and most of the people we interviewed believe the guidelines will increase the workload of court and court-related personnel.

Views of the Judiciary

In its Report of the Proceedings of the Judicial Conference of the United States held on September 18-19, 1986, the Judicial Conference noted that although the details of the sentencing guidelines had not been finalized, there is no doubt that the guidelines will significantly increase the work of probation officers and district and circuit court judges. It pointed out its intention to request additional judicial branch resources to implement the guidelines properly.

In his July 23, 1987, testimony before the House Judiciary Committee's Subcommittee on Criminal Justice, the Chairman of the Federal Judicial Center's (the research, development, and training arm of the federal judicial branch) Committee on Sentencing Guidelines Education said,

> "The guidelines will greatly increase the length of sentencing hearings which will increase the workload of district judges, magistrates, federal public defenders and probation officers....appellate judges and their personnel will experience a vast increase in their workloads. Any increase in federal judicial workloads can only be accommodated with difficulty. At the present, the delays in the availability of new judgeships and the availability of appropriations to fund needed supporting personnel have continually kept the Judiciary in the posture of 'racing to catch up' with demands for services."

On June 18, 1987, in testimony before the Subcommittee on Crime of the House Committee on the Judiciary, the Chairman of the Judicial Conference's Committee on the Administration of the Probation System said,

> "...when guideline sentencing takes effect, the probation workload in every court will experience an increase overnight of approximately 20 percent."

In addition, one of the members of the Sentencing Commission, who is also a circuit court judge, believes that the workload of court officials will increase under the guidelines. In a June 18, 1987, letter to a judge from the Sixth Circuit Court of Appeals, he said the guidelines could significantly increase the workload of circuit court judges, and possibly increase the workload of district court judges and magistrates.

Views of Persons Interviewed

To obtain their views on the potential impact of the sentencing guidelines on the workload of federal criminal justice system personnel, we interviewed 26 knowledgeable persons, including 7 district and circuit court judges, 5 probation officers, 5 defense and prosecuting attorneys, an official from both the Administrative Office of the United States Courts' Magistrates Division and Office of General Counsel, an official from the U.S. Marshals Service, an official from the FPS, 3 officials from the Federal Judicial Center, an official from the American Bar Association, and a law professor from Yale University. Most of the persons interviewed believe sentencing guidelines will increase the workload of all court and court-related personnel except magistrates.

District Court Judges' Workload

Twenty-four of the persons interviewed told us that the workload of district court judges would increase under sentencing guidelines and no one said that a decrease would occur. They provided various reasons for the potential increased workload, including their beliefs that there would be

- an increase in the number, duration, and complexity of hearings to resolve factual disputes and determine the sentence;
- an increase in the number of trials because more people will elect to go to trial rather than plead guilty under guidelines;
- a need to take greater care in explaining reasons for sentences in order to comply with reporting requirements and possible appellate review; and
- an increase in the time to review plea agreements to assure that the guidelines are not being circumvented.

One person told us that no change would occur in the district court judges' workload and one person did not express an opinion.

Circuit Court Judges' Workload

All of the persons interviewed said that circuit (appeals) court judges will have an increased workload under sentencing guidelines. The primary basis for this unanimous view is that Public Law 98-473 significantly expands the basis for appealing sentences. Under the current system, sentences can only be appealed if they violate the law (e.g., exceed the maximum sentence authorized by law). Under section 213(a) of Public Law 98-473, both the defendant and the government can appeal sentences. Both can appeal based on the sentences violating the law or the incorrect application of the sentencing guidelines. In addition, the defendant can generally appeal any sentence greater than the sentences specified in the guidelines and the government can generally appeal any sentence that is less than the guidelines.

On May 9, 1984, we testified on various sentencing reform proposals before the House Judiciary Committee's Subcommittee on Criminal Justice. We said most circuit court judges (93 percent) who responded to our questionnaires indicated that sentencing reform measures involving single appellate review of sentences could increase the workload of circuit courts. In addition, most of the responses from district court judges (98 percent) and U.S. attorneys (89-97 percent) indicated that the workload of the circuit courts could increase as a result of sentences being appealed.

Probation Officers' Workload

Twenty-four of the persons interviewed told us that the probation officers' workload would increase under sentencing guidelines. The reasons included the following:

- Probation officers will need to assume new responsibilities in fact-finding and preparation of the presentence investigation reports.
- Probation officers will be the focal point for calculating sentences under the guidelines.

One person told us that no change would occur in the probation officers' workload and one person did not express an opinion.

Defense Attorneys' Workload

Twenty-three of the persons interviewed told us that the defense attorneys' workload would increase under sentencing guidelines and no one said that a decrease would occur. They provided various reasons for the potential increased workload, including the following:

- There will be more trials, more complex sentencing procedures, and more appeals.
- There will be more sentencing hearings, more in-depth analysis of what the real facts of the case are, and more time in developing complex plea agreements with prosecutors.

Two of the persons interviewed said that the defense attorneys' workload would not change and one did not express an opinion.

Prosecutors' Workload

Twenty of the persons we interviewed told us that sentencing guidelines would increase the prosecutors' workload. The reasons cited for the potential increases were similar to those cited for defense attorneys. Four interviewees said there will be no change in the prosecutors' workload and two did not express an opinion.

Court Reporters' Workload

Citing similar reasons for potential workload increases for other court personnel, 21 of the persons we interviewed told us that court reporters' workload would increase. One interviewee believed court reporters' workload would decrease because of an expected decrease in the number of cases going to trial. Two interviewees said that there would be no change in court reporters' workload and two did not express an opinion.

U.S. Marshals' Workload

Sixteen of the interviewees said that U.S. Marshals will experience an increased workload as a result of the sentencing guidelines primarily because more prisoners will need to be transported by marshals, and more court hearings will occur. Four interviewees expressed the view that no change would occur in the marshals' workload and six did not express an opinion.

Magistrates' Workload

Unlike the other court personnel, half of the interviewees believed that there would be no change in magistrates' workload primarily because they did not believe that magistrates would normally be involved with felony cases. The nine persons who told us that the magistrates' workload would increase cited some of the same reasons given for increases in the district court judges' workload (e.g., the potential for more trials). Four interviewees did not express an opinion.

Advantages and Disadvantages for Delaying Implementation of the Sentencing Guidelines

In an April 13, 1987, letter transmitting the guidelines to Congress, the Commission's Chairman said the limited time for preparing the guidelines did not permit the Commission to field test them to the degree the Commission would have desired. The Chairman added that delaying implementation would provide additional time for the Commission, in conjunction with the Federal Judicial Center, the Department of Justice, and the Probation Division of the Administrative Office of the United States Courts, to conduct extensive training programs for judges, probation officers, prosecution and defense attorneys, and others.[4]

The Chairman's letter further explained that the Commission would use the information received during the field testing and educational period to prepare any necessary technical and substantive amendments to the guidelines. The Commission plans to submit any needed amendments to Congress by February 1, 1988, so they could take effect with the initial guidelines on August 1, 1988. Under section 994(p) of the law, amendments to the guidelines submitted by the Commission take effect in 180 days unless action is taken by Congress to disapprove or modify them.

On July 16, 1987, the Executive Committee of the Judicial Conference endorsed the Commission's suggestion for a delay, but concluded that an additional 3-month delay would be beneficial to allow time for a smoother transition into the new system, would allow the judiciary to proceed with implementation more effectively, and would allow time for education of all those involved in the criminal justice system. In contrast, on May 22, 1987, the Attorney General stated that he opposed delaying the implementation of the sentencing guidelines because of possible changes that could negatively affect the federal criminal justice system.

In case Congress does not approve an extension, the Commission is proceeding with its testing and training plans on the basis of a November 1, 1987, implementation date. In addition, the Commission is developing a monitoring and evaluation system for the guidelines to be implemented by November 1, 1987.

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[4] When we were completing our audit work, two of the Commissioners told us that they believed that a majority of the Commission's voting members would no longer be in favor of a delay in implementing the guidelines because the testing and training efforts are proceeding very well. However, according to the Commission's General Counsel, the Commission has not changed its official position that a delay in the guidelines implementation date to August 1, 1988, is needed. He said, however, that in September 1987 the Commission's Chairman plans to discuss a number of issues with the Commissioners, one of which may be the delay issue.

The persons we interviewed identified advantages and disadvantages to delaying implementation of the guidelines. The 22 respondents who favored delaying implementation of the guidelines differed in their views on the length of the delay, with suggested delays ranging from 6 to 22 months. They said a delay is warranted in order to

- finish testing the guidelines to eliminate ambiguities and to assure consistency of application;
- educate and train district and appellate court judges, probation officers, and attorneys in the use of the guidelines; and
- design and put in place a data collection system for monitoring guidelines implementation.

The Chairman of the Federal Judicial Center's Committee on Sentencing Guidelines Education said the 9-month delay in implementation of the guidelines requested by the Sentencing Commission is warranted because the guidelines will result in a dramatic change in the federal criminal justice system. He said that the delay in implementation would enable the judiciary to better identify the type and scope of training needed by court personnel. He also said the more comprehensive the training, the more it would minimize potential problems such as errors in application of the guidelines and unnecessary appellate review of sentences to correct these errors.

The Chairman of the U.S. Parole Commission and its Director of Research and Program Development said that on the basis of the Parole Commission's experience in implementing the parole guidelines that are used in making parole release decisions, the Sentencing Commission's request for a 9-month delay to conduct field testing and training of personnel on the sentencing guidelines did not seem unreasonable. They also said that more than 9 months might be needed due to the complexity of the sentencing guidelines and the large number of personnel who would require training. For example, before the initial implementation of its parole guidelines, the United States Board of Parole[a] began a pilot project in 1972 that included, for the first time, the use of guidelines to aid in the parole decision. On the basis of experience with the pilot project, the Board modified its guidelines and adopted them in 1974 for use in making all federal parole decisions. The parole guidelines are less complex than the sentencing guidelines and are used by a much smaller number of people.

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[a] Public Law 94-233, March 15, 1976, retitled the United States Board of Parole as the U.S. Parole Commission.

States' experience in implementing sentencing guidelines provide mixed results on the importance of training. For example, in Minnesota only limited training was provided while in Pennsylvania, the training was more comprehensive. Both states experienced a 50 percent error rate during the initial implementation period. The guidelines in both states were less complex than the proposed federal guidelines.

Reasons cited by the four persons we interviewed who were not in favor of delaying implementation of the guidelines past November 1, 1987, included the following:

- The legislation required to permit delay could also change or abolish the guidelines.
- The guidelines are superior to the present system since they provide for fixed sentences with no parole and increased sentences, especially for white-collar crimes. Problems with the guidelines can be fixed over time.
- The necessary training can be provided within the current time frame. The guidelines only apply to offenses committed after November 1, 1987. Because there is a delay between when a crime is committed and when the offender is sentenced, there will be sufficient time for training practitioners.

The Sentencing Commission's Plans for Field Testing the Guidelines

The Commission is field testing its sentencing guidelines across the country with small groups of probation officers. In addition, on August 19, 1987, the Commission field tested the guidelines with prosecutors from Department of Justice headquarters and several U.S. attorney offices. It also plans to include judges and federal defenders in its field tests but has not finalized its plans. If the effective date of the guidelines is extended, Commission officials said they would conduct more extensive field tests.

The Commission has developed work sheets, instructions, and test cases for field testing the guidelines. The field testing by probation officers is being conducted in 7 to 10 locations during the period July 13 through September 29, 1987. According to the Commission, if all 10 locations are included, at least 111 probation officers presenting 44 of the 94 federal judicial districts that account for more than 50 percent of the total federal criminal caseload will have participated in the field testing. At the conclusion of each testing session, the Commission is requesting that each probation officer apply the guidelines to three recent cases with which they are involved and mail their results to the Commission. Analysis of this material is ongoing.

Plans for Training Criminal Justice System Personnel in Use of the Guidelines

The Federal Judicial Center will receive approximately $870,000 from the Sentencing Commission to provide training on using the guidelines to about 3,600 court personnel, including district and circuit court judges, full-time magistrates, probation officers, and defense attorneys. According to a Department of Justice official, Justice plans to conduct its own training program for over 2,500 prosecutors.

On May 6, 1987, the Federal Judicial Center's Committee on Sentencing Guidelines Education approved a training plan for the guidelines. It covers basically four approaches to training: (1) between June and October 1987, the Federal Judicial Center plans to add presentations and discussions of the guidelines to regularly scheduled Center seminars and workshops; (2) from May 1987 to January 1988, the Center plans to provide special instructional materials, mainly for probation officers, on specific skills that the guidelines will require; (3) from October through November 1987, the Center plans to provide each district court with a self-contained training package that includes video materials on the application of the guidelines, discussion questions, and detailed written instructions and exercises; and (4) the Center will conduct follow-up training programs as necessary. The Sentencing Commission worked with the Center to develop a training program and approved the general training agenda.

The training plan is subject to change on the basis of new developments and needs that come to the attention of the Federal Judicial Center's Committee on Sentencing Guidelines Education. The committee plans to work closely with the Sentencing Commission and with federal judges and other judicial system personnel during the development and implementation of the educational program on sentencing guidelines.

Judiciary Is Revising Presentence Investigation Reports and Plans to Train Probation Officers in Using New Reports

Under the sentencing guidelines system, the presentence investigation report prepared by probation officers will continue to be the principal document that court officials use to determine the appropriate sentences for convicted federal offenders. The Probation Division of the Administrative Office of the United States Courts is modifying the current presentence investigation report form and its preparation instructions. The objective is to incorporate the information necessary for sentencing under the guidelines system.

Probation Division officials said current plans call for the revised form and instructions to be completed, including pretesting, by the end of

August 1987. The Judicial Center has developed a plan that incorporates a training program for probation officers on how to use the new form and instructions. The Federal Judicial Center's training coordinator told us that this training will take place by the time the first offenders are sentenced under the guidelines.

Probation Division officials responsible for modifying the presentence investigation reports told us that certain variables emphasized in the current system will not be that important under the proposed guidelines. For example, there will be less emphasis on marital and family matters in presentence investigation reports. However, the reports will require new and/or more specific information under the guidelines. The officials said that new information requirements will include the probation officer's own account of the offense committed, while in the current system the probation officer only records the versions of the offense described by the prosecutors and defense attorneys. Officials said that under the guidelines, the presentence investigation report will have to be very specific in terms of the dollar amounts stolen in theft cases. In addition, they said that in drug cases, the reports will have to be more specific in terms of the victim's age, whether the drug was sold to juveniles near a school, and whether juveniles were used to transport the drugs.

The presentence investigation reports may require additional revisions depending on the results of the Commission's field tests of the guidelines.

The Sentencing Commission Plans to Establish a Monitoring and Evaluation System

The Commission has said the guidelines will continue to evolve over time. To enable the Commission to modify the guidelines and to make sure that judicial and prosecutorial practices do not circumvent them, the Commission will need a monitoring and evaluation system. Part of this system will involve capturing information to be collected under sections 994 and 995 of Public Law 98-473. Section 994(w) directs the Commission to submit a report to Congress at least annually on the results of sentencing information received from the courts. Section 995 allows the Commission to monitor the performance of probation officers regarding sentencing recommendations and to systematically collect and disseminate information concerning sentences imposed.

The Commission has recently begun to develop a monitoring and evaluation system to capture information on judicial and prosecutorial practices under the guidelines. The Commission is currently determining what kind of monitoring and evaluation system is needed and the degree of sophistication required. For example, it is considering whether to look at every case in detail or only a sample of cases.

A key area that the Commission will need to monitor and evaluate is the use of plea agreements. Plea agreements have become a common tool of U.S. attorneys for disposing of criminal cases. They generally consist of an agreement between the prosecutor and the defendant or defense counsel whereby in return for a defendant's guilty plea, the prosecutor agrees not to press other charges that he/she asserts could be proven in a trial. According to the Administrative Office, during the 12-month period ending June 30, 1986, about 86 percent of the convicted defendants in federal criminal cases entered guilty pleas. Because plea agreements have an impact on the ultimate sentence imposed on the defendant, the consistency of their application directly influences the treatment of defendants, and inconsistent application can result in disparate treatment. The Commission intends to study plea agreement practices under the guidelines and seek to further regulate the plea agreement process if necessary.

Constitutionality of the Guidelines May Be Questioned

On May 12, 1987, the Subcommittee on Criminal Justice, House Committee on the Judiciary, held hearings on the constitutionality of the Sentencing Commission and its sentencing guidelines. The issue discussed at the hearings was whether Public Law 98-473, which authorizes the establishment of binding sentencing guidelines by a nonelected body (the Sentencing Commission), improperly delegates the legislative authority of Congress. According to the persons who testified, the constitutionality of the sentencing guidelines will probably be challenged on this basis. The consensus among the witnesses was that the sentencing guidelines will survive any separation of powers challenge if the final guidelines are enacted into law, in essence treating the guidelines as recommendations.

The separation of powers argument was supplemented by observations of some witnesses concerning the constitutionality of permitting Article III judges[6] to serve on a presidentially-appointed panel. Their concern was that such appointments subjected the judges to the possibility of removal from the panel by the President and also required the judges to devote time to a matter (i.e., the deliberations of the panel) which does not involve the judicial branch function of considering a specific case or controversy. In our view, these supplemental questions do not appear to raise significant constitutional issues.

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[6] Article III judges are appointed for life under Article III, Section 1 of the Constitution. They can only be removed for cause through impeachment proceedings.

One way the guidelines could be challenged and the issue of constitutionality decided by the court would be if a defendant sentenced under the final guidelines brought suit alleging that the guidelines under which he/she was sentenced do not have the force and effect of law because they were unconstitutionally promulgated. If challenged, it could take some time before the issue is resolved. The witnesses predicted that it could be as long as 3 years for a challenge to work its way through the courts and be resolved by the Supreme Court. If a law was enacted calling for accelerated judicial review (e.g., Balanced Budget and Emergency Deficit Control Act of 1985, Public Law 99-177, dated December 12, 1985), the witnesses said the issue would probably be before the Supreme Court in about 1 year. There are approximately 40,000 defendants sentenced in federal courts each year. This workload could be significantly increased if the guidelines were found to be unconstitutional and offenders sentenced under them had to be resentenced.

ASSESSING THE GUIDELINES OF THE UNITED STATES SENTENCING COMMISSION

Preliminary Report of the Ad Hoc Sentencing Study Group

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Introduction

On June 18-19, a small ad hoc group of scholars, lawyers, criminal justice reformers and judges convened in New York City to study the initial Sentencing Guidelines and Policy Statements of the United States Sentencing Commission. Most members of the study group has been involved in the sentencing process, its administration or reform efforts for a decade or more. Several have been proponents of federal sentencing guidelines since the mid-1970's. The guidelines had been submitted to Congress on April 13, 1987, and amended by the Commission two weeks later on May 1, in accord with the provisions of the Sentencing Reform Act of 1984. The guidelines will automatically become law in the federal courts on November 1, 1987, unless Congress extends the effective date.

This report suggests the corrective actions that Congress, the Commission, the courts, and the bar should take to remedy the deficiencies in the guidelines and the underlying statute. The report also encourages lawyers to develop sentencing briefs, and courts to write opinions, that spell out sound principles of sentencing that the Commission's research failed to uncover and that revised guidelines should incorporate.

The starting point for this report is our acknowledgment of warm support for the idea of structuring judicial discretion that Congress codified in the Sentencing Reform Act. We applaud the Act's vision of a system that can guide the sentencing process by rules of law, preserve the discretion of trial judges to individualize sentences, require sentencers to explain their decisions, make each sentence reviewable by an appellate process that can develop principles of sentencing, and provide a feedback mechanism by which those principles can be further refined. These features, if successfully translated into action, can end the historic absence from criminal sentencing of the principle of accountability embedded in other areas of American law.

We also applaud the Commission's decision, reflected in its April 13 introduction, to adopt an evolutionary approach to the development of guidelines -- an approach that is intended to be less limiting of sentencing departures at the outset than at a later stage. Despite the Commission's healthy attitude towards permissible deviations, however, we believe that the initial guidelines contain serious flaws. We share the deep concern of federal judges, the American Bar Association and other sentencing practitioners and scholars about the unreadiness of this early draft to become federal law.

We do not share the views of critics who are urging Congress to turn back the clock, repeal the 1984 Sentencing Reform Act, and abandon the guidelines enterprise. Unless these guidelines are revised promptly, however, we sense the likelihood of turmoil and hostility in the courts, creating a needless risk that this important and controversial innovation will ultimately fail. Our report is intended to assist commissioners, legislators, courts and others in averting such failure.

Background

The modern concept of guidelines has evolved over the past fifteen years. It has been applied to parole and bail systems as well as to sentencing, in a number of states as well as the federal system, sometimes as a matter of statute, at other times through the voluntary action of courts or parole authorities. In all contexts, including the 1984 Sentencing Reform Act, the idea of guidelines has been to structure -- but not straitjacket -- the discretion of the judge or other decisionmaker. Gradually evolving rules of law are to replace unarticulated insight, intuition and hunch as the backbone of the sentencing process. The objective is a system in which sanctions are individualized on the basis of sound legal principles that promote candor in sentencing, avoid unduly harsh or lenient sentences, reduce unwarranted disparity, and promote proportionality.

Guidelines may also serve to carry out special public policies. Examples include: to increase penalty levels for unusually dangerous crimes against persons; to promote the development of effective community punishments; and to adjust sentences of imprisonment to the availability of prison resources.

The need for guidelines arise out of the deficiencies of prior sentencing legislation, not the decisions of sentencing judges. "It is the legislature, not the judiciary, that is to bear the blame," wrote Senator Edward Kennedy in 1977, not long after introducing the first federal guidelines bill in the Congress. "The sad fact," he said, "is that our judges act without any guidelines or review because Congress and the state legislatures have not built any standards or safeguards into the sentencing process."

That accurate observation was based on the fact that American legislative policy towards sentencing has long vacillated between two untenable extremes: [i] discretionary sentencing laws that allow each trial judge -- within wide ranges -- to impose whatever sanction he or she deems appropriate to the individual case; and [ii] mandatory sentencing laws that require all judges to impose a prescribed or minimum prison term for a designated crime, regardless of extenuating circumstances and variations among individual offenders.

By acting in 1984 to establish a guidelines commission, Congress moved toward the middle ground between the extremes of unstructured judicial discretion and coerced uniformity.

Sentencing guidelines, however, are easier to talk about than to draft. It is easier to give instructions to a sentencing commission than to serve as a commissioner and draft sound guidelines that make sense in court. It is also easier to be a critic of someone else's guidelines than to draft them oneself. We therefore approach with humility the task of assessing the United States Sentencing Commission's early work.

We believe that federal sentencing guidelines should become binding only when they merit affirmative answers to three questions:

- Do the guidelines appear to meet the standards carefully worked out by Congress in the Sentencing Reform Act?

- Have the guidelines been adequately tested on real cases so as to give reasonable assurance that they will do justice rather than promote arbitrariness?

- Do the guideline procedures sufficiently reflect the experience, wisdom and responsibility of federal judges?

While the initial guidelines incorporate many useful elements, they do not yet satisfy any of these criteria.

Summary of Recommendations

In Part A, we endorse the Commission's April 13 request for an extension of time, and illustrate the range of guidelines deficiencies that will be inflicted on the courts if Congress fails to grant it.

Congress took nine years to draft the careful and comprehensive instructions set forth in the Sentencing Reform Act of 1984. The commission had only fifteen months between January 1986 and April 1987 to comply with these mandates. This period, in retrospect, was too brief for any commission to carry out the complex research tasks assigned to it.

The Commission published three versions of guidelines over a period of seven months. The first two drafts were severely criticized in public hearings and largely abandoned. The version that was laid before Congress in April was fundamentally redrafted in the Commission's final thirty days before the statutory deadline. No time remained to expose it to public scrutiny as required by the Act. The guidelines turned out to be deficient in a number of respects tacitly acknowledged in later Commission publications. Probably no major reform proposal in the history of federal criminal law has been allowed to become law on the basis of such pressured drafting followed by so little exposure to independent study, public hearings and informed debate [A. 1].

By granting an extension, the Congress would provide time not only for testing and training, but for the Commission to remedy deficiencies in four areas:

(1) To correct misinterpretations of the 1984 statute which led the Commission erroneously
-- to homogenize the distinctive purposes of sentencing defined in §3553 [A. 2],
-- to preclude consideration of important offender characteristics, other than prior criminal record, identified in §§994(d) and (e) [A. 3], and
-- to virtually eliminate guideline sentences that rely on measures other than prison cells, contrary to provisions like §3553 and §994(j) [A. 4];

(2) To reduce the needless complexity of the April guidelines [A. 5];

(3) To comply with the congressional mandate in §994(g) for guidelines that avoid crowding Federal prisons beyond their capacity [A. 6]; and

(4) To develop recommendations on two issues for the Congress to reconsider:

-- the incompatibility of Congress' 1986 mandatory drug sentencing law with the Commission's duty under the 1984 Act to oversee a comprehensive rational sentencing system [A. 7]; and
-- the absence of a safety valve mechanism to cope with prison overcrowding and excessive prison terms [A. 8].

In Part B, we spell out two preliminary recommendations to litigants and judges for achieving justice in sentencing despite guideline deficiencies:

> (1) Courts should depart from guideline sentences, as authorized by the Sentencing Reform Act and the generous departure invitation issued by the Sentencing Commission, whenever adherence to the guidelines would result in an unjust or inappropriate sentence [B. 1]; and
>
> (2) Sentencing judges should issue and publish formal sentencing opinions in selected cases, especially when departing from the guidelines, in order to illuminate the facts, criteria, purposes and principles on which their sentences are based. Such opinions can make important contributions to the development of a common law of sentencing, and provide courts of appeals with a body of knowledge about the nature of the sentencing process in the district courts [B. 2].

Part A. Recommendations to Congress and the Commission

In this first part of the report we identify a number of issues as to which Congress or the Commission gave inadequate attention. If not resolved satisfactorily, these deficiencies will result in unjust sentences, overcrowded prisons, and wholesale departures from the guidelines.

The relationship between guidelines and departures is essential to an understanding of this analysis. In §3553(b), Congress set down two rules to define the general obligation of trial judges to follow the guidelines, and the circumstances under which judges are authorized to depart from guidelines:

> [1] "The court shall impose a sentence of the kind, and within the range, referred to in" the applicable Sentencing Commission guidelines;
>
> [2] "Unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into account by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."

In several sections below, we describe particular issues that were not adequately considered by the Commission, thereby setting the stage for frequent departures.

1. Preliminary testing

Congress, in retrospect, provided insufficient time for the new commission to complete two threshold tasks: (1) to respond carefully to the many instructions contained in the Sentencing Reform Act; and (2) to test its draft guidelines before launching them nationwide. The Commission could have remedied the deficiencies described in sections 2-5 below, and attended to the statutory problems discussed in sections 6-8, if more time and testing had been available. Until these deficiencies are remedied, they provide a sound basis upon which courts may depart from guideline sentences.

The Commission was given 18 months to deliver its initial guidelines to Congress. It consumed three months in hiring a staff, searching for office space, and attending to the myriad details involved in establishing a new public agency. During the remaining 15 months, it needed to design complex research projects; to gather and analyze reliable data about current law, current sentencing practices and future system impact; to frame and resolve a host of difficult policy issues identified in the statute; to draft guidelines to govern the intricate network of criminal provisions scattered throughout the United States Code; to conduct public hearings in conformity with the Administrative Procedure Act; to carry out field-testing in a fair sample of crimes, offenders and geographical areas; and to consolidate the results of these inquiries into a workable set of guidelines.

The Commission was not able to complete all of its tasks within the allotted statutory period. We think it doubtful that any commission could have done so. Some tasks were carried out only by ignoring the statute, by giving inadequate consideration to its issues, or by relying on data whose validity cannot withstand scrutiny. It is therefore not surprising that when it finally delivered its guidelines to Congress, the Commission itself requested more time before they would go into operation.

We commend the Commission for accomplishing so much, including publishing two preliminary sets of draft guidelines -- in September and January -- each followed by public hearings. Both drafts were criticized severely by members of the judiciary and the bar, and were ultimately set aside by the Commission. But they brought home to a wide audience the importance as well as the difficulty of producing guidelines. Many useful suggestions flowed from those hearings. The commissioners responded thoughtfully each time with significant improvements, as well as new flaws.

Following the hearings on the second draft in mid-March, the third draft incorporated a number of totally new features. It was completed on April 13. The April version included an extraordinary range of fundamental changes in policy and detail. Time simply ran out before this draft could be subjected to the public hearing process required by §994(x). The Commission thus had no choice but to lay that unexamined version before Congress --- without testing, or debate, or review by judges and lawyers outside its small office. Eighteen days later, on May 1, the Commission submitted an extensive set of guideline amendments to Congress, again unscreened by independent judges, lawyers or public witnesses.

In the normal course of the legislative process of the United States Congress, a draft code of such complexity and importance to the administration of justice would have become the subject of extensive and meticulous scrutiny. Public hearings, redrafting, review by subcommittees and full committees, further amendments, detailed committee reports analyzing each provision, debates in the Senate and House, and eventual reconciliation of differing versions by a Senate-House conference committee, all would have preceded final passage, Presidential review and enactment into law. The drafting of the Commission's statutory charter went through just such a congressional screening process over a period of nine years.

Neither the guidelines submitted to Congress on April 13 nor the amendments submitted on May 1 received any of this legislative scrutiny. Nevertheless, they will automatically become law on November 1, exactly in the form delivered six months earlier by the Commission, absent a new statute that postpones that date. Not a single error can be corrected unless by an Act of Congress and the President's signature to delay the guidelines, or by Commission revisions in the guidelines, during 1988 open season -- January 1 to May 1 -- for proposing amendments to Congress, as provided in the Sentencing Reform Act.

A number of informed organizations have questioned whether these guidelines are ready for implementation. The Sentencing Commission's request for more time was strongly endorsed by, among others, the Executive Committee of the Judicial Conference of the United States, the Federal Judges Association and the American Bar Association. Summer hearings before the Criminal Justice Subcommittee of the House Judiciary Committee elicited substantial evidence in support of an extension. In late September, the subcommittee voted unanimously for a nine months' extension, and the Judiciary Committee favorably reported that bill to the House in early October. The House, taking up the bill on its consent calendar, rejected the measure a week later.

Why was widespread consensus of professional opinion ignored? We think that, if an agreeable method can be found, the members of Congress, the Attorney General and the President would wish to avoid thrusting a flawed set of guidelines on an unprepared system when the commissioner-authors, as well as most of their audience, believe an extension of time for preliminary testing and revision to be essential.

A field test would bring to light those features of the present draft that could cause chaos or injustice were it to go into effect unchanged. Our vision of a test period is of trial judges, probation officers, United States Attorneys and defense lawyers engaged in structured exercises with actual cases in selected courts. Side by side with their responsibilities under current law, the parties would be asked to describe and assess how the case would have to be tried and resolved if the guidelines were in operation.

The charging and plea bargaining process could not be significantly tested during this exercise. Nor would fact-finding procedures or appellate review fully simulate a guidelines system. But judges and probation officers, using Commission worksheets, would be able to ascertain similarities and differences between their normal sentencing practices and those that guidelines would prescribe or permit.

The Commission ought to offer the courts and the bar a collegial role both in the test phase and subsequent guidelines revisions. While only selected issues of policy and procedure could be illuminated by this process, the cooperative approach is clearly preferable to confrontation as the most promising route to workable guidelines.

Absent an extension by Congress, we think courts should treat the early months of guidelines implementation as a period of testing and feedback to the Commission during which flawed guidelines are undeserving of presumptive validity. During this period, courts ought to depart from the guidelines whenever necessary to redress any of the deficiencies outlined in the following sections.

2. Sentencing purposes.

This section and the two that follow analyze the Commission's guidelines with respect to [i] the purposes of sentencing, [ii] the history and characteristics of the offender, and [iii] the availability of punishments in the community. These three areas have important interconnections. Taken together, they profoundly affect the selection of sentences in our justice system, which rejects the narrow view that punishment should be based solely on the crime. Yet in each area -- probably because insufficient time was available to it -- the Commission promulgated guidelines that are inconsistent both with the Sentencing Reform Act and the experience that could have been gleaned from sentencing judges.

Congress' basic instruction as to sentencing purposes is directed by §3553(a) to judges:

> "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-.....
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner...

According to Senate Report 98-225, this section "requires the judge to consider the four purposes of sentencing before imposing a particular sentence" (75). Under §994(g), the Commission has a duty to promulgate guidelines that meet these purposes.

In response, the Commission soundly rejected advice it select a single purpose -- like "just deserts" or "crime control" -- to govern all guidelines. It correctly observed that the Sentencing Reform Act "refused to accord primacy to any single purpose of sentencing." But then, instead of dealing discretely with each purpose, and assigning each its proper place for particular cases, crimes, or criminals, the Commission simply threw up its hands in despair and concluded that it could "balance all the objectives of sentencing" in guidelines that contain no distinctions and offer no choices based on a sentencer's purpose (Supp. Rep. 16). It decided that no individual purpose made any difference because all purposes ultimately lead to the same sentence for all offenders in all circumstances, looking only at the nature of the crime and criminal history. "In practice," wrote the Commission, "the differing philosophies are generally consistent with the same result." The debate "is to a large extent academic" (p. 16).

The commissioners are wrong. They arrived at this erroneous conclusion by failing to examine the reasoning processes that experienced judges act upon when they select one or more purposes to be served by a particular sentence for a particular offender. Choosing from this spectrum of purposes enables judges to do justice in sentencing. The Commission did not systematically interview judges or observe them in court. Its research methods focused exclusively on presentence investigation reports written by probation officers, and on statistics about sentences. Neither of those methods produced any information about the role of purpose in the congressional prescription or judicial selection of sanctions.

Addressing purpose serves two critical functions in sentencing. First, determining an appropriate objective enables a judge to individualize a sentence, within whatever general guidance the penal law provides. This may mean going above a presumptive sentence for one offender and below it for a different offender. Second, attention to the full range of sentencing purposes enables the criminal justice system to carry out a purposive distributive function: to distribute different kinds and degrees of punishment across the complete spectrum of offenses and offenders.

Section 3553(a) would become a nullity if the distinctions among incapacitation, deterrence and rehabilitation, for example, were obliterated so that these purposes were deemed interchangeable or homogenized as one composite goal. As Senate Report 98-225 noted:

> "the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of offenders. The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is ... to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case" [77, emphasis added].

Section 3622 would similarly be left hanging if the Bureau of Prisons were given no reference point when seeking to exercise its authority to grant temporary release of a prisoner

> "if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission" [emphasis added].

On the other hand, careful attention to purpose is necessary in an effective guidelines system lest unguided judicial discrepancies in the choice of purposes remain a continuing source of unwarranted disparity.

An unhappy consequence of the failure to examine distinctive purposes at sentencing is that it led the Commission to forsake imaginative strategies for guiding the use of noncustodial sanctions. For many offenses, for example, a fine large enough to serve the purposes of retribution and deterrence might be an entirely appropriate sentence. Similarly, a credible and enforceable prohibition against participating in specified activities, such as alcohol abuse or being present in a place where drugs are sold, or engaging in a particular profession, might adequately incapacitate some offenders. Or, as illustrated in Senate Report 98-225, "Rehabilitative considerations may call for a sentence to probation with appropriate conditions where a sentence to a term of imprisonment in other circumstances might be 'just'" [75 n. 162].

A guidelines drafter ought to develop with considerable care a set of principles and illustrations pertaining to purposes. Such principles, derived from observing and analyzing common law cases, can help a guidelines commission -- the same as a sentencing judge -- individualize the choice among punishment objectives in different kinds of situations. If the opposite drafting philosophy governs, and a simple two-dimensional, purpose-free grid is adopted, guidance remains unavailable to answer the question: What combination of noncustodial measures, or mix of noncustodial measures and shorter terms of imprisonment, are appropriate when sentencers have different statutory purposes in mind? In such circumstances, the sentencer is compelled either to choose a purpose-free guideline or select a purpose and a different sentence with no guidance at all.

We do not believe that a sentencing commission, deliberating around a conference table without information about judicial thought processes, can draft guidelines which adequately reflect the purposes set forth in the congressional mandate. Experienced judges are the primary sources of information and insight on how and when different purposes come into play. The Commission has an obligation to tap those sources. Only after it has adequately considered their lessons will it be in a position to determine the extent to which it should replicate their practices or reject their advice.

The Commission needs to formulate two kinds of questions for judges to answer when they give reasons for sentences. These questions should be included in the worksheets for probation officers and judges. It should inquire, first, about factors that trigger the choice of purpose -- including the decision to weight one purpose more heavily than another -- in particular cases. Second, judges should be asked to identify the factors that lead them to select the "proper" sanction. A case by case approach is congenial to the work of judges and traditional in the development of common law principles.

Such an exercise will no doubt uncover some shared principles of sentencing, some conflicting principles, and a wide range of seemingly disparate sentences that result from efforts to achieve different purposes in a variety of situations. Such information will enable a research-oriented commission to determine the extent to which the apparent disparity is justified or unwarranted, and to study the aftermaths of various sentences before undertaking to restrict purpose-oriented sentencing. This kind of inquiry can facilitate important advances in the field of sentencing, leading a commission to accept some judicial practices and reject others.

A rigid approach, on the other hand, may well lead to the demise of guidelines if they are seen as little more than mechanical instruments for selecting judicial decisions out of little boxes. Faced with the conflict between a statute that requires individualized consideration of sentencing purposes, and guidelines that blur all purposes into one, a sentencing judge has no choice but to follow the statute, depart from the guidelines, and specify the purpose that leads to the selection of the appropriate sentence.

3. Offender characteristics.

In defining the factors that courts are to consider in determining an appropriate sentence for a particular offense, Congress in §3553(a)(1) listed first "the history and characteristics of the defendant." The primacy of these elements lies in the fact that judges need to understand the person they are sentencing in order to determine what purpose or purposes their sanction ought to serve.

Congress instructed the Commission in §994(d) to consider whether eleven designated offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence," and to "take them into account only to the extent that they do have relevance." The attributes are age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and dependence upon criminal activity for a livelihood.

In §994(e), Congress restricted the inquiry in respect to education, vocational skills, employment record, family ties and responsibilities, and community ties. The Commission was directed to assure the "general inappropriateness" of considering these five factors "in recommending a term of imprisonment or length of a term of imprisonment." These factors were not so limited in relation to the setting of enforceable conditions of noncustodial sanctions. As indicated in Senate Report 98-225,

> "each of these factors may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community" [174-175].

In an extraordinary series of policy statements collected in Chapter 5H of the April 13 guidelines, the Commission ruled out as "not ordinarily relevant in determining whether a sentence should be outside the guidelines" most of the offender characteristics that were noted as relevant by Congress in §994(d), that presentence reports conventionally describe, and that trial judges have historically used to set sentences [see §§5H1.1-1.6]. Out of the eleven characteristics listed in §994(d), only variations in an offender's criminal history [§5H1.8], dependence upon criminal activity for a livelihood [§5H1.9], and role in the offense [§5H1.7] were declared to be "relevant to determining the appropriate sentence." These survived as permissible bases for moving sentences into higher or lower guideline ranges.

Of the eight remaining noncriminal characteristics in §994(d), the guidelines say that six may influence a judge's discretion inside a guideline's 25% range, but may not ordinarily be invoked to justify sentences outside the guidelines. Two characteristics, physical condition and previous employment record, are declared to be not ordinarily relevant even "in determining where within the guidelines a sentence should fall."

Confirming the exclusion of these characteristics from normal guideline sentencing are the Commission's worksheets for federal probation officers. The October 1987 worksheets contain no listing for any personal characteristic other than the offender's criminal history. A probation officer or judge who considers an attribute such as age, education, vocational skills, employment record, mental, emotional, or physical condition, family responsibilities or community ties, to be relevant to sentencing -- including its impact on making some particular sentencing purpose achievable or impossible to achieve -- may still take it into account. But the probation officer or judge may do so only by explicitly departing from the guidelines and explaining that departure in the blank space at the end of the worksheets.

The policy decisions in Chapter 5H did not flow from any research conducted by the Commission. These Commission decisions were apparently made under considerable time pressure in the closing days before the guidelines were submitted to Congress. The commentary to the April 13 guidelines makes no mention of any information upon which they were based. The Supplementary Report, which explains a number of Commission decisions, is altogether silent as to the source and reasoning that led to these restrictions.

In contrast, Chapter 4A of the guidelines and chapter 5 of the Supplementary Report devote considerable detail to discussing the relevance of an offender's criminal history to the severity of sentences. The odd message that emerges from this contrast between the handling of criminal history and of noncriminal characteristics is that everything in a person's police record is highly relevant to Commission guidelines, but not much else in one's life may be considered an aggravating or mitigating circumstance. Yet without considering a person's police record in the context of his or her age, family, employment, and other background characteristics, judges often find it impossible to assess the relevance, and shape the sentencing consequence, of that record.

The failure to explain these critical policy decisions suggests that the Commission may not have recognized the importance of the changes it was producing in the historic sentencing process. There is certainly no indication that the Commission gave "adequate consideration," within the meaning of §3553(b), to the value that experienced judges attach to individual offender characteristics, and to the troublesome issues that different characteristics raise.

The Commission's task under the statute is not easy. Absent guidance on offender characteristics, different judges move in different directions on the same facts. Figuring out how to structure their discretion is a major challenge. The following paragraphs dealing with age, drug abuse, and culpability offer just a few illustrations.

Age.

Some judges, for example, consider youth to be an aggravating circumstance because the rate of offending is highest in the early years and deterrent measures seem called for. Others deem youth a mitigating factor, think that increasing the risk of apprehension is the most likely deterrent for this group, and seek to avoid contaminating youthful offenders by locking them up with hardened criminals. Studying when and how judges use age in adjusting sentences up or down is an essential step in the process of developing sound guidance. As indicated by the Senate Report:

> "For example, some judges use the [Youth Corrections] Act's sentencing provisions for most youthful offenders, while others will not use it for those involved in serious felonies. The Committee believes that, while consideration of youth in determining the appropriate sentence may be justified, the consideration should be employed in a much more rational and consistent way than it is today" [172].

The Commission's age policy, however, appears to bar youth either as an aggravating or a mitigating factor. It simply says (§5H1.1):

> "Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options."

The only stated exception is for cases where the offender is "elderly and infirm."

The Commission oversimplifies its own task, and complicates that of judges, when it essentially instructs: "Don't think about an offender's youthfulness" [§5H1.1]. The absence of any explanation of the policy stands in striking contrast to the Senate Committee's standard for the kind of inquiry into offender characteristics it thought the Commission should make:

> "The Committee believes that it is important to encourage the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise" [175].

Drug abuse.

Substance abuse also provokes purposeful but seemingly opposite responses by sentencers in current practice. One judge -- focusing on rehabilitation -- will say: "Let's halt this abuser's reliance on property crimes to support his habit. Let's refer him to the A-1 Drug Treatment Center." A second judge, adopting incapacitation as the dominant purpose, orders a prison term, commenting: "I have no faith in the treatment facilities in this community, and I want to send a message to would be drug-abusers." Perhaps the disparate resources, and different patterns of drug abuse, in different jurisdictions warrant different sentences. Or perhaps they warrant the Commission's support for more drug treatment facilities.

Policy Statement §5H1.4, however, finds the Commission opting solely for incapacitation:

> "Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime."

By thus failing to acknowledge that "increased propensity to commit crime" can sometimes be controlled by ordering drug treatment, perhaps on an outpatient basis, the Commission rejects a potential mitigating factor in sentencing without adequately considering its efficacy. Therefore, if a judge believes that drug treatment may effectively cure a drug abuser, the Commission's omission entitles the judge, under §3553(b), to reject §5H1.4 and depart from the guideline sentence with a statement of reasons.

Culpability.

All of the offender characteristics in Chapter 5H are pertinent to the experience of common law sentencers that some offenders are more culpable than others with respect to past acts, or more likely than others to engage in future misconduct. Lawfully convicted of the same crime, two offenders may differ considerably in their moral blameworthiness, in the motives that led them to crime, in the sophistication or naivete with which they embarked on the enterprise, in their roots or rootlessness in the community, in their ties to lawful or criminal lifestyles.

Offenders come to be arrayed along a continuum of understandable or incomprehensible human misbehavior, of dangerousness or potential for reform. Judges carefully assess the character and future prospects of an offender when determining the appropriate purpose to be served by a sentence, the sanction to be selected, and the severity with which it should be carried out. As judges grow more sophisticated about deviant behavior, they become more tolerant of some explanations of criminal conduct than of others. They come to understand that the same sentence may have different consequences for different offenders. A system of guidance that ignores or overrides such experience is likely itself to be disregarded or overruled.

We recognize the difficulty of identifying objective criteria of individualization and proportionality in written guidelines, especially since written opinions by judges are not yet typical of our sentencing tradition. Yet to ignore such considerations in formulating guidance for the sentencing process is to reject principles of blameworthiness and proportionality as old as the law itself.

Sophisticated guidance with respect to characteristics like these examples of age, drug abuse, and blameworthiness requires the Commission to learn about the experiences of sentencing judges, and to assess the effectiveness of sentences before deciding how to reflect them in guidelines. It needs to capitalize on useful techniques developed by judges, and to discourage sentences (whether imprisonment or otherwise) found to be futile.

The Commission has yet to conduct systematic inquiries of this sort. It has relied, in its early research, largely on statistical analyses of data taken from presentence investigation reports (PSI's) written by probation officers. These are useful materials. But federal PSI's may or may not articulate the reasoning process used by the probation officer in recommending a sentence. And in any event it is the judge, not the probation officer, who weighs the information and recommendation of the probation officer, prosecutor and defense attorney; who resolves disputes about sentencing information after a hearing in open court; who determines the extent to which characteristics like dangerousness or harmlessness ought to influence the choice of sentencing purpose; who assesses the culpability and weighs the likely consequences of different sentences on the defendant and on the community; and who ultimately imposes the sentence and is responsible for explaining it.

Until the Commission assesses sentencing practices by today's judges, guidelines that reject that experience without adequate consideration should themselves be rejected by judges when to do otherwise would lead to unjust or disparate sentences.

4. Guidelines for noncustodial sentences

Sentences in federal court today are split about equally between imprisonment, on one hand, and probation and fines on the other. The Commission's proposed guidelines would substantially nullify this division and guide the overwhelming majority of convicted offenders into prison or some other form of custody. Nothing in the statute supports such a radical change in penal policy. No published analysis of the efficacy of prison or probation underlies the Commission's unprecedented proposal. Its reports are devoid of any reasons for so dramatically altering today's sentencing patterns.

Section 3553(a) provides that

> "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]. The court, in determining the particular sentence to be imposed, shall consider . . .
> (3) the kinds of sentences available."

According to the Senate Report, this subsection "requires the judge to consider all sentencing possibilities." In part the provision was added because under today's system

> "prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing" [77].

Section 3553(a) is the Congressional equivalent of recommendations by the American Law Institute's Model Penal Code and the American Bar Association's Standards for Criminal Justice for a "least restrictive alternative" principle of sentencing, and of the United States Parole Commission's principle of parsimony that favors using "the least restrictive sanction required to fulfill the purposes" of its governing statute. Rules and Procedures Manual §2.20-07 (April 5, 1987).

The Commission effectively rejects that principle. By homogenizing all purposes of sentencing [section 2, above], excluding offender characteristics other than criminal history from consideration [section 3], and prescribing imprisonment for the great majority of crimes in the criminal code, its guidelines largely relegate to the realm of departures all sentences other than sentences to prison terms.

The dimensions of this assault on probation, fines, community service orders and other options are shown in Chapter 7 and Table 2 of the Commission's Supplementary Report of June 18. The Commission's deliberate policy choice is to reduce substantially the frequency of straight probation and correspondingly increase custodial sentences. According to Table 2, straight probation will drop from 31.4% in offenses against persons today to 14.6% under guidelines. The corresponding drop for property offenses is from 60.1% to 33.1%. These impacts are discussed more fully in section 6 below.

In the process of disparaging probation, fines, and other controls and punishments that accomplish their purposes without relying on prison cells, the guidelines overlook or narrow the intent of a number of statutory provisions. We list several to illustrate the scope of the Commission's departure from its own statutory guidelines.

-- Section 3561 confers on judges the authority to sentence a defendant to a term of probation for any kind of crime unless it is a Class A or B felony [imprisonment for 20 years or more], or a statute expressly precludes probation.

-- Section 3562 defines how courts are to consider whether, and how, to impose probation conditions. Senate Report 98-225 makes clear that a sentence of imprisonment is not

> "the only form of sentence that may effectively carry deterrent or punitive weight. It may often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any deterrent or punitive purpose" [92].

-- Section §994(j) provides for the "general appropriateness" of a nonprison sentence for first offenders not convicted of "a crime of violence or otherwise serious offense."

-- Section 3553(a)(2)(D) instructs judges to determine the need to provide offenders with rehabilitative or correctional treatment "in the most effective manner."

-- Section 994(k) instructs the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant."

-- Section 994(e) declares the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment. According to Senate Report 98-225,

> "The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties" [175].

The proposed guidelines, on the other hand, recognize only two insssdependent punishments -- probation and imprisonment -- and require some term of imprisonment for all offenders except those falling within the lowest six of 43 categories of offense severity displayed in the Sentencing Table on page 5.2. This almost negligible scope for probation is a substantial and retrograde departure from current federal practice.

The guidelines provide no systematic provision for the following non-incarcerative sanctions.

(1) Fines.

Fines are not authorized as independent sanctions for individuals. Subject to constitutional limits concerning ability to pay, the guidelines say that "the court shall impose a fine in all cases" [§5E4.2]. Requiring fines in all cases, and only as adjuncts to other sentences, is unrealistically mechanical and trivializes the use of fines as credible sanctions.

There is extensive experience in England and Western Europe with the use of fines as punishments for serious crimes, and with careful adjustment of fines to the financial circumstances of individual offenders. The existence of a well-trained, adequately-funded Federal Probation Service should permit creative use of financial sanctions in appropriate cases. Such use could be simultaneously punitive, nonincarcerative, and in furtherance of deterrent goals of criminal punishment.

One financial provision of the proposed guidelines is particularly undesirable. Section 5E4.2(i) provides that "the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." Whatever the theoretical allure of such a provision, it poses enormously difficult mechanical and administrative problems to compound the challenges presented by an already complex guidelines system. While there are undoubtedly some individual cases where such a financial sanction is appropriate, it is not realistic or desirable to require universal application.

(2) Community Service, House Arrest, Intensive Supervision Probation.

Although there is extensive, well-documented positive experience with these nonincarcerative sanctions in a variety of states and in other countries, the proposed guidelines limit their role to "conditions of probation" and provide no guidance or significant limitations on their use even in that context. Here, too, the resources and professionalism of the Federal Probation Service make the federal system especially promising for increased, systematic use of such sanctions as alternatives to prison in appropriate cases.

The Commission based its limited approach to nonprison sentences on two rationales. First, it defined as "serious" many offenses for which probation is now given. It thereby semantically sidestepped §994(j)'s directive that the guidelines reflect the general appropriateness of nonprison sentences for first offenders convicted of other than violent or "otherwise serious" offenses. Second, it interpreted §994(b) -- the 25% range limitation -- to prohibit probation in any crime category in which a guideline prison sentence can exceed six months.

By treating all nonprison sentences as, in effect, a "zero month term of imprisonment," the Commission limited nonprison sentences to those six offense levels in which the maximum was six months or less. Section 994(b), however, limits the breadth of only prison sentence ranges. It does not affect, or even mention, probation or other nonprison sanctions. Section 994(a)(1) provides that guidelines are to assist judges in two kinds of determinations: "whether to impose a sentence to probation, a fine or term of imprisonment"; and, how to ascertain the appropriate "amount" of a fine or "length" of a probation or prison term. Unless the 25% limitation were applicable solely to the latter determination, the guidelines could never offer courts a choice of sanctions, a result that would plainly conflict with many sections of the statute.

The Commission, in our view, has a mandate to develop guidelines for the use of sentences other than prison, and to do so for the full range of offenses, except for crimes that carry prison terms of up to twenty years or more.

The Commission explains that "the reduction in straight probation," which for many crimes is "quite substantial," "results from the reduction of disparity in sentence length" [Supp. Rep. 61 n.104]. This could only be justified if one were to find that most probation sentences today are unwarranted deviations from an imprisonment norm. Nothing in the Commission's data supports that proposition. The Commission's premise is an artifact of inadequate research into today's system.

Nearly 50% of today's Federal sentences are to probation and fines. The Commission's grid destroys these norms. It does so without adequate consideration of the effectiveness of current practice, without exploiting its opportunity to expand community punishments as many states are doing, and contrary to the spirit of innovation that led Congress to pass a Sentencing Reform Act and devote so much attention to sanctions other than prison.

We suggest that, in applying the guidelines in either a nonbinding test or in actual operation, judges should assist the Commission by departing from prison sentence guidelines -- with a careful statement of reasons -- whenever the offender characteristics, the appropriate sentencing purpose, and the availability of community resources combine to make credible the imposition of a noncustodial sanction. The Commission should find the resulting data instructive, and helpful in accomplishing its ultimate goal. That goal should be a system in which selective and purposeful imposition of noncustodial sanctions falls within, rather than as a departure from, many more guideline sentencing ranges.

5. Complexity of Guidelines

The proposed guidelines are more complex than is needed to accomplish the Commission's stated objectives. The effect may be significantly to diminish the guidelines' credibility in the eyes of judges and lawyers and thereby to frustrate achievement of the Commission's goals.

At the same time, the Commission's April 13 report is explicit that its approach to sentencing reform is gradualist and evolutionary. Policy statements invite judges to depart from guidelines. The Commission repeatedly acknowledges the importance of the exercise of judicial discretion. Several times it observes that circumstances of particular cases may justify imposition of sentences at odds with those prescribed by the guidelines.

We rehearse these indications that the Commission intends a gradualist approach to make the following point: relatively modest goals can best be achieved by the use of relatively simple, easily understood, guidelines. Combining gradualist goals with highly complex guidelines is likely not only to frustrate achievement of those modest goals but may result in increased disparities and inconsistent decisionmaking compared with current practice.

There is considerable experience in this country with the use of parole, sentencing and bail guidelines. Although the decisions these various guidelines affect are different, guideline mechanics are much the same no matter what the decision at issue. That experience teaches that highly complex guideline systems are vulnerable to two serious problems.

First and most important, highly complex guidelines are often simply not credible in the eyes of the officials who must apply them. If the guidelines are not credible, they are unlikely to elicit cooperation and good faith efforts to achieve the drafter's goals. The guidelines may simply be ignored, as has happened in some jurisdictions. The guidelines may be complied with in form but not in substance. Or, as often happens with mandatory sentencing laws, if the guidelines are not credible, judges and lawyers may feel free to manipulate them in whatever way is necessary to achieve results that appear appropriate in individual cases.

Second, complex guidelines are often misapplied. Probation officers' and judges' caseloads are often high, presentence investigation report information is often of questionable reliability, and guideline scoring is often hurried. In some complex parole guideline systems, researchers found simple calculation errors in as many as 75% of all parole release files. Similar problems of mechanical miscalculation of guidelines have bedeviled many guideline systems.

When the goals of a guideline-creating exercise are highly ambitious and aim to impose radical constraints on the exercise of judicial discretion, there may be no choice but to adopt highly detailed guideline systems in order to address the kinds of problems identified above. However, when the goals of guideline drafters are more modest, the adoption of a highly complex system simply invites and creates foreseeable problems in implementation and application that could easily have been avoided.

Without sacrificing any of its policy goals, the Commission could have developed a sentencing grid much simpler than its 43-story tower of punishment. Several ways to do this are available.

First, the 43 levels can be reduced to at most 18 by means of three separate actions:

(1) The 13 levels from 31 to 43 can be reduced to 4 with no meaningful loss of precision. For example, an armed robbery involving $5 million involving infliction of life-threatening bodily injury is a level 30 offense. Very few

federal offenses are more serious than this. Three levels with ranges of, say, 151-188 months, 220-265 months, 292 months to life, surely would provide adequate scope for choice for those exceptional crimes.

(2) The six lowest levels can easily be collapsed into two levels of 0-3 months and 0-6 months, thereby allowing increased opportunity to individualize sentences.

(3) The remaining 24 levels can be cut to 12 simply by reducing (not eliminating) overlap between authorized sentencing ranges. In the current draft, each range overlaps with the two above it and the two below. If this were reduced to overlap with one above and one below, the number of levels could be halved.

Second, the Commission could divide the current grid into separate grids for misdemeanors (or misdemeanor-type crimes) and felonies. This would allow the guidelines to differ for the two categories of crimes. It would simultaneously allow the Commission to provide fuller guidance for nonprison sentences for misdemeanors and make the overall system less mechanical and daunting in appearance.

The preceding suggestions are only illustrative. We do not urge that these specific proposals be accepted. They do show, however, that the grid can be reconstituted to make it less forbidding. The Commission's grid was mechanically determined by decisions to allow the maximum six months or 25% range for every cell, and to provide five levels of overlap for every offense level. Because the credibility and workability of the entire guidelines system is in doubt, these mechanical approaches should be reconsidered.

6. Prison impact.

Congress issued three instructions to the Commission in §994(g) regarding prison impact:

> [i] to minimize the likelihood that guideline sentences will produce a federal prison population that exceeds the capacity of federal prisons;
> [ii] to determine for itself the capacity of federal prisons; and
> [iii] to make recommendations concerning any expansion in prison capacity that might become necessary as a result of guideline sentences.

Following submission of its April guidelines, the Commission forecast a prison population within fifteen years that would be nearly triple today's design capacity. These data were disclosed for the first time in the Commission's Supplementary Report, published on June 18.

Accepting the Commission's research at face value, the impact data are awesome. Under the low-growth scenario [p. 71], the prisoner population in federal institutions will rise from 42,000 in 1987 to 72,000 by 1992, a 71% increase in five years!

Under the Commission's high-growth scenario [p. 73], the population will rise from 42,000 to 79,000 in the same period, an 88% increase. According to Commissioner Michael Block, Federal prisons today are already crowded to nearly 50% over design capacity, by Bureau of Prisons standards. At that rate, the 1992 population will be two and a half times today's capacity under the low-growth scenario, and 2.76 times capacity under the high-growth assumption.

Surprisingly, when the Commission learned of this impact it responded to none of Congress' §994(g) requirements. It submitted no recommendations for prison expansion to meet the extraordinary population burden it had projected. It did not make the required independent assessment of prison capacity. It gave no indication of trying to minimize the likelihood that prisoner population would exceed prison capacity. Nor did it illustrate what modified guidelines might look like if they were to maintain imprisonment within current resource constraints. Unless the Commission undertakes tasks such as these, the result will be gross overcrowding, leading to court ordered releases. The Commission will have effectively created an ad hoc parole commission.

Chapter Seven of the Commission's Supplementary Report addresses comprehensively the subject of prison impact. Not once in its 23 pages does it mention §994(g) or the duties that section imposes on the Commission. Instead, the chapter says simply that Congress directed the Commission "to estimate the impact of the sentencing guidelines on future prison populations," as though the Commission were to be a mere reporting agency. But prison population cannot be treated as beyond the control of the federal system's new sentencing policymaker.

Two themes dominate chapter 7. The first is that the Commission has intentionally increased the volume and proportion of prison sentences and the length of prison terms. The second is that the resulting impact of the Commission's guidelines on prison population pales in comparison with the impact of Congress' enactment of long mandatory minimum prison sentences for drug offenders in the 1986 Anti-Drug Abuse Act, and for career-offenders in the 1984 Comprehensive Crime Control Act [p. 53].

The Commission reports that its own guidelines would reduce straight probationary sentences for property offenders from 60.1% to 33.1%, and substitute some form of confinement [p. 61]. They would also substantially increase the average prison sentences for violent offenses, for burglary and for income tax fraud [p. 53]. But, as though entering a disclaimer of responsibility for the resulting prison impact, the Commission states that its "sentencing guidelines alone [i.e. excluding consideration of the drug and career offender sentences] will contribute only marginally" to the dramatic growth of federal prison populations "by the end of this century" [p. 53].

In spite of this disclaimer, the Commission remains fully responsible for compliance with §994(g). Congress did not exempt its mandatory sentences from the purview of the Commission's §994(g) duty to minimize prison impact. Indeed, the Commission's decision to increase average sentences for even minor property offenses becomes all the less explicable in light of the population pressure that must be expected if the mandatory drug and career offender statutes remain unaltered. It is the Commission's delegated responsibility to fashion and recommend sentencing policies that will avoid unconstitutional overcrowding while meeting the serious concerns of crime control. It has not done so.

In fact, the Commission did not even stick to the mandatory minimum sentences in its drug guidelines. Instead, it seems to have interpolated those laws to deal much more severely with some drug offenders than the 1986 law requires. According to Table 3 in the Supplementary Report, drug sentences since the 1986 law average 48.1 months; under the guidelines, they will average 57.7 months. This appears to represent a 20% increment due to Commission policies.

Part of the extension of time that the Commission requested of Congress needs to be devoted to complying with §994(g). In that process, it should recalibrate its guidelines and submit two versions. The first version might display the Commission's ideal of an effective sentencing policy. Attached to it should be the Commission's prison expansion recommendations and estimated costs.

The second version should confront reality. It should set forth modified guideline sentences that illustrate how to contain the prison population each year within existing or gradually increasing prison capacities.

Congress, not the Commission, should ultimately decide which scenario, or blend of scenarios, best accommodates the tension between federal penal policy and federal prison costs. In making that assessment, Congress will undoubtedly wish to consider the impact of prosecutorial policy, especially in the drug enforcement area. Justice Department and United States Attorneys' decisions to bring large numbers of drug prosecutions carrying long mandatory sentences, or to decline many cases in favor of local prosecution, will significantly influence the anticipated rise in the number of federal prisoners. Congressional appropriations policy similarly influences expenditures on investigative and prosecutorial resources. See Supp. Rep. 56.

These prison resource calculations should prompt the Commission to reconsider not only the length of its guideline prison sentences, but the wisdom of its substantial reduction in the use of sentences other than prison. This reconsideration should provoke careful inquiry by the Commission into issues of mandatory sentencing and safety valves.

Until action can be taken in these areas to relieve the "impending crisis in prison overcrowding," judges should heed the advice contained in §239 of the Sentencing Reform Act that "available prison space must be treated as a scarce resource in the sentencing of criminal defendants." That section, enacted as a sense-of-the-senate resolution, urged that in the two years preceding the commencement of sentencing guidelines,

> "federal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, community service, and other alternative sentences in cases of nonviolent and nonserious offenders."

Federal judges were therefore asked, when determining individual sentences, to

> "consider . . . the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense."

The Senate undoubtably limited its admonition to the pre-guidelines period, because the it expected the Commission to respect its duty under §994(g) to minimize the likelihood that prison population would exceed prison capacity under the guidelines. Since the Commission has thus far disappointed that statutory expectation, judges ought to impose departure sentences as necessary to preserve §239's limited presumption against incarceration.

7. Mandatory sentences.

Less than two years after it established the Sentencing Commission, Congress passed the Anti-Drug Abuse Act of 1986. The Act was designed to toughen federal controls on drug dealing. One notable feature was long mandatory prison sentences.

Mandatory sentences are simply congressionally-drafted sentencing guidelines. In principle, however, they remove not only the discretion of judges over individual cases but the discretion of the Sentencing Commission over an entire category of crimes. If the Sentencing Commission is to survive as architect and monitor of a comprehensive federal sentencing policy, it needs to find a way to modify the incompatibility of mandatory sentences with a guideline system.

The magnitude of the 1986 law's impact on the federal sentencing and prison system is potentially staggering. Drug offenders presently "constitute the single largest block of federal prisoners" [Supp. Rep. 57 n. 98]. And "full implementation" of that Act "will, under any of the scenarios, be the major factor in increasing prison population in the next decade" [Supp. Rep. 66]. Thus when, in 1986, it eliminated Commission discretion to adjust downward the severity of drug sentences, Congress seemed to forget its own lofty 1984 goal -- expressed in §994(g) -- to develop a rational sentencing policy that would acknowledge a resource constraint on the cumulative severity of prison sentences.

A small step in the same direction had in fact been incorporated in the 1984 Sentencing Reform Act itself. Section 994(h) required Commission guidelines to specify a term of imprisonment "at or near the maximum term" for certain career offenders. That requirement is implemented by Chapter 4B of the guidelines. A career offender is defined as one whose current offense is a crime of violence or drug trafficking, and who has at least two prior felony convictions for crimes of violence or controlled substance offenses. While the principle of mandatory penalties is the same in the drug and career criminal laws, the impact of the latter seems negligible compared to that of the drug law.

The Commission estimates that mandatory drug sentences would increase prison population by 10-11,000 prisoners (17%) within five years, and by 24-30,000 prisoners (38%) within ten years [Supp. Rep. Tables 4 and 5]. The career offender provisions would add another 1-2,000 prisoners by 1992 (1-2%), and 4-6,000 (5-6%) by 1997. The projected contribution of these mandatory sentences to a bloated federal prisoner population over the next decade has already been outlined in section 6 above.

If the Commission is to be restored to its 1984 position of relevance in the making of sentencing policy, the drug penalty law needs to be modified. The modification process must take account of three problems: (1) the extent to which mandatory penalties frustrate the statutory goal of a system that can balance prison sentences against prison capacity; (2) their incompatibility with the principle of proportionality, under which judges traditionally adjust sentence severity to important offender differences; and (3) their tendency to transfer sentencing power from judges to prosecutors.

First, by itself ignoring resource impact when enacting the drug law, Congress made the §994(g) directive difficult for the Commission to take seriously. The demoralization of the Commission is evident in its passive disclaimer throughout Chapter 7 of the Supplementary Report of any responsibility for the impact drug sentences will have on federal prisons. The solution lies in the direction of restoring to the Commission some measure of authority to propose new magnitudes for drug sentences.

Second, the different levels of culpability among different offenders, and the varying backgrounds they bring to a criminal enterprise, are wiped out as individualizing considerations whenever all judges are compelled to give all offenders the same high minimum sentence. The Commission is powerless under the drug law to adjust sentences downward, either to achieve proportionality among offenders or to avoid prison crowding. The solution here is to give the Commission authority to propose a proportionality scheme for drug offenders.

Third, the history of mandatory sentencing lends a powerful note of cynicism and unreality to the Commission's work. Centuries of experience, as well as modern empirical research, demonstrate that tough mandatory sentences do not in fact produce high sentences for all offenders. Instead, they are often circumvented or mitigated by discretionary decisions -- sometimes by transferring judicial sentencing power to prosecutorial control over charging and plea bargaining, sometimes by jury nullification, sometimes by executive clemency. The Commission itself assumes that many offenders subject to the drug law will receive significantly reduced sentences: even its own estimates may "understate the degree of sentence reduction that will occur" [Supp. Rep. 58 n. 100]. Of course, for offenders who receive mandatory sentences that are not subsequently mitigated, disparity is the outcome. The only solution here is to give the Commission authority over drug sentences that permits it to avoid rigid adherence to the terms of imprisonment in the 1986 Act.

Our suggestion that the Commission ask Congress to reconsider the drug mandatories does not mean that necessarily we favor repeal. At the time the drug law was enacted, there was no guideline system in effect. Discretionary sentencing was the rule of the day. Congress needed to demonstrate the urgency of the drug dealing crisis by enacting severe guidelines of its own. Perhaps it intended the mandatory feature as only an interim measure, pending the development of drug guidelines that could take account of the need for heightened severity.

As soon as guidelines go into effect, some of those premises will change and the remedy can similarly be modified. Discretionary sentencing will be supplanted by guidelines that carry presumptive force. The legislature's desire to increase penalties for a devastating crime can certainly be honored by guidelines that are tough without uniformly reaching the minimum levels now stated in the law. It will not be inconsistent to include proportionality measures in those guidelines, and to pay careful attention to the prison impact mandate of §994(g). Most of all, there will no longer be a need for the penalties to be mandatory. In effect, the Commission can propose a set of 1988 drug guidelines to supplant the 1986 mandatory sentences, thereby vindicating the goals of its own 1984 statute. It can do this by recommending an amendment to the 1986 law.

Congress explicitly invited the Commission in §994(r) to recommend changes in statutory penalty structure. And in §995(a)(20), it gave the Commission power to make recommendations

> "concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."

The Commission should exercise that power. It should examine the drug penalty structure, make its own recommendations for an "effective, humane and rational" sentencing structure, and propose them to Congress as part of its overall guidelines system. It should not simply copy a mandatory scheme that omits those considerations. For the Commission to do otherwise would be to passively acquiesce in the destruction of its own mission.

8. Safety valves.

As soon as sentencing guidelines go into operation, the correctness of each sentence will become subject to review on appeal. But two longstanding methods of revisiting "correct" sentences after prisoners have begun serving them will simultaneously be abolished: the discretionary authority of district judges to modify sentences under Rule 35, and the discretionary authority of the Parole Commission to release prisoners before their full terms have expired. The loss of these traditional safety valve mechanisms means that neither individual prisoners nor the wardens of overcrowded prisons will be able to secure relief, apart from the President's power to grant clemency and the congressional power to pass new laws.

Despite the new appeal provisions, unwarranted disparities are bound to be created between guidelines sentences that have been affirmed, and departure sentences -- produced by plea bargains or otherwise -- that have not been appealed. Disparities will also flow from the different paths that prosecutors are likely to pursue because of the mandatory sentencing problems described earlier. Research by the Commission on the individual sentencing reports filed by judges under §994(w) may further reveal disparity between systematic severity by some district or circuit courts and leniency by others.

In the interest of preventing foreseeable and manifest injustice, we urge Congress to create some system for reexamining claims of aberrant and extremely long sentences. This might be accomplished in any of a number of ways. One possibility would be to allow an incarcerated offender to ask an appellate court for relief if the sentence could be shown to be "plainly excessive." A second possibility would be to establish a prison overcrowding and relief mechanism, as a number of states have already done, and empower it to identify the appropriate sentences for the courts to review and selectively curtail.

A third option would empower the United States Parole Commission, or a similar agency, to receive and act upon petitions for release submitted by prisoners who received sentences longer than the longest sentence authorized under the applicable guideline range. This would limit the parole release function to offenders who received a sentence above the guidelines. A fourth option, a variant on the third, might reauthorize the Parole Commission to consider petitions only from prisoners receiving sentences exceeding a specific length -- five years, for example.

We are more concerned with the need to institutionalize some safety valve method than with any particular approach to the inevitable problems of individual injustice and overcrowded facilities. This need is not based on the discredited notion that "rehabilitated" prisoners ought to be considered for early release. Recent research discloses that parole evolved in some places out of an historic necessity to devise a mechanism that could provide systematic overview of long sentences in a prison system. See Messinger, Berecochea, Rauma and Berk, The Foundations of Parole in California, 19 Law and Society Review 69 (1985). That comparability review function is not displaced by appellate review of individual cases by twelve courts of appeals.

The Commission should study the gap between the kinds of prison sentences that justify careful reexamination, and the availability of mechanisms for remedying particularly troublesome sentences in a timely and effective manner. The Sentencing Commission was not designed to be a quasi-judicial decisionmaking agency to adjudicate individual cases. Recommendations to Congress for some new safety valve provision should be formulated at an early date, since occasions for review may begin to arise shortly after guidelines go into effect, and the legislative process is characteristically deliberative and slow.

Part B. Recommendations to Judges and the Bar

If the guidelines should go into effect without changes of the sort suggested in Part A, judges should accept the invitation of the Commission and the statute to depart from deficient or inappropriate guidelines. We add this Part in the belief that courts should refrain from complying with a flawed guideline in any case where its application would distort the sentencing process and lead to injustice. The concept of departure was invented for precisely these reasons.

1. Guideline departures.

The Sentencing Reform Act does not contemplate blind conformity to sentencing guidelines. Guidelines should announce principles, starting points and measuring rods, not mandatory sentences. Their purpose should be to aid courts in thinking about sentences, not to foreclose courts from exercising discretion.

A guideline sentence fits a case when the guideline ingredients adequately take account of the severity of the crime and the history and characteristics of the offender, and the purposes to be sought through the imposition of penal sanctions. If the Commission fails to consider an important factor when constructing its guidelines, or acts unwisely in overweighting or undervaluing the factor, a judge is duty bound to recognize the Commission's error, take the factor soundly into account, depart from the guideline sentence, and file a statement of reasons to justify the substituted sentence and aid the Commission in revising the guidelines.

The judge's statement should specify "the specific reason for the imposition of a sentence different from that described" in the guideline [§3553(c)(2)]. This is a particularly important procedure to follow at the outset of a guidelines system, when the Commission is experimenting with a radically new and untested set of rules and needs the wisdom, guidance and feedback of experienced judges.

Congress explicitly authorized courts in §3553(b) to depart from guideline sentencing ranges when they find aggravating or mitigating circumstances that were "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." A similar statement appears in §991(b)(1)(B). In order to provide a context for a judge's assessment of what the Commission considered, and how adequate that consideration was, Congress directed the Commission in §235(a)(1)(b)(ii)(I) to submit its guidelines "along with a report stating the reasons for the Commission's recommendations." A judge is entitled to rely on the May 1 volume of guidelines, and the June 18 Supplementary Report, in determining whether adequate reasons underlie a particular guideline in issue.

The Commission wisely invites judges to depart from the May 1 guidelines to a far greater extent than the statute itself authorizes. On page 1.6, it states that

> "in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."

The Commission lists only three exceptions -- three sentences out of its 200 page guidelines volume -- that contain rules "the court cannot take into account as grounds for departure." (Guidelines p. 1.6). Beyond these, the Commission says, it

> "does not intent to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case."

The Commission goes on at some length to describe the careful reasoning that lies behind this liberal policy, and to illustrate the kinds of departures available to judges.

The Commission's departure advice, coupled with the bases for departure we have spelled out in Part A, offers defense attorneys, prosecutors and judges sufficient opportunities to assure just sentences even in the early days of the new system. Careful attention to whether a departure is called for is the best way to test the soundness of the guidelines themselves.

In the long run, the evolution of the law surrounding departures will become the foundation for a new common law of sentencing. The principles that emerge from that process will shape the sentencing guidelines of the future. The Commission's initial guidelines have triggered that process. The most important redrafting of those guidelines must now shift to the sentencing briefs and arguments of counsel and the decisions of sentencing courts.

2. Sentencing opinions

Sentencing judges should issue and publish formal sentencing opinions in selected cases, especially when departing from the guidelines, in order to illuminate the facts, criteria, purposes and principles on which their sentences are based. Such opinions can make important contributions to the development of a common law of sentencing, and provide courts of appeals with a body of knowledge about the nature of the sentencing process in the district courts.

A common law of sentencing can only emerge from the application of sentencing guidelines to a large variety of individual cases. The process of application will fall into two categories. First, there will be cases in which the guidelines are applied and a sentence is imposed within the range specified by the Commission. Second will be the large category of cases in which the guidelines sentence is deemed inappropriate and the court departs from the applicable range. The later category offers the principle opportunity for federal courts to develop a law of sentencing that takes account of the many factors which the Commission failed to consider adequately.

In these departure cases, it is of critical importance that judges do more than just devise an appropriate sentence for the individual offender. Judges must also spell out the purposes and principles, as well as pertinent statutory provisions, on which they rely. These published opinions will create the occasion upon which federal judges, for the first time, will be able to exchange views in written form on the jurisprudence of sentencing.

In order to enable judges to draft useful opinions in the sentencing area, defense lawyers and prosecutors must write briefs and make arguments which propose relevant principles, applicable standards, particular purposes, and pertinent statutory provisions. For in the same way that briefs and oral arguments have contributed to the development of common law for both criminal and civil law, advocacy by counsel will now become the cornerstone upon which courts can reach informed decisions about sentencing criminal offenders.

Conclusion

In formulating its guidelines, the Sentencing Commission compiled volumes of information and statistics about federal criminal laws and sentences imposed in the past. Thousands of presentence reports and reams of computerized data were analyzed to shape the decisionmaking process of the Commission. Many useful insights were gathered in the course of that work. But the most essential ingredient of all -- the human dimension in sentencing -- was overlooked.

What the Commission missed, in part because Congress provided it too little time to develop the initial guidelines, was the process by which human judges sentence human offenders. It did not examine how judges exercise discretion, how they strive to understand crimes and offenders, and how they make decisions. The Commission looked at papers but it did look not at cases. It examined inputs to and end products of sentencing, but not the process of judging itself. It compiled sophisticated statistical analyses of sentences, but made no effort to study and learn how live federal judges think about sentencing.

The upshot of this abstract research is a set of guidelines which simply do not acknowledge the complexity of the human process of sentencing that takes place in federal district courts in small and large cities all across the United States. The guidelines fall short of the Commission's statutory duty to understand the role of purpose in formulating a sentence today before prescribing the role that purpose must play in the sentences of the future. The Commission failed to assess the history and characteristics of offenders in order to devise guidelines that could guide judges when they individualize sentences. The Commission failed, as well, to consider the range of sentencing options -- in and out of prison -- that Congress ordered it, as well as judges, to consider before deciding on the specific sanction or set of sanctions to impose.

By falling short in these respects, among others, the Commission did not adequately consider many of the factors which judges are commanded by §3553 to think about in every sentencing case. As a result, judges are left with no alternative but to depart under §3553 from the Commission's guidelines in large numbers of cases. As judges come to do this, and to write opinions explaining their reasoning, a common law of sentencing will develop. These developments will no doubt help shape a wiser set of guidelines in the future.

Daniel J. Freed
Yale Law School

Norval Morris
University of Chicago
Law School

Michael E. Smith
Vera Institute of Justice

Michael H. Tonry
Castine Research Corp.

Franklin E. Zimring
University of California
School of Law, Berkeley

Ruth G. Wedgwood
Yale Law School

Morris E. Lasker
U.S. District Judge, S.D.N.Y.

Robert W. Sweet
U.S. District Judge, S.D.N.Y.

Kenneth F. Schoen
Edna McConnell Clark Foundation

Marc Miller
Vera Institute of Justice

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Inquiries concerning this report may be directed to
Prof. Daniel J. Freed, Yale Law School, 127 Wall Street,
New Haven, CT 06520. Tele.: (203) 432-4843, or to
Marc Miller, Vera Institute of Justice, 377 Broadway, New York,
NY 10013. Tele.: (212) 334-1300.

STATEMENT OF SCOTT WALLACE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
BEFORE THE
U.S. SENATE JUDICIARY COMMITTEE
REGARDING
FEDERAL SENTENCING GUIDELINES
OCTOBER 22, 1987

On behalf of the National Association of Criminal Defense Lawyers, I am pleased to present our views on the Federal Sentencing Guidelines and Policy Statements, as submitted to the Congress on April 13, 1987. My name is Scott Wallace, and I am Legislative Director of NACDL.

We are grateful to the members and staff of the Commission to have had the opportunity to work with them throughout the lengthy and difficult process of the development of these guidelines. Due in large part to the sincere interest of Chairman Wilkins in conducting an open process, our views have been solicited and listened to--though, to be sure, not always deferred to or implemented--at every step of the way.

Unfortunately, good faith and openness are not enough. The Commission had a very difficult time threading its way through the many difficult and complex issues it tackled, and in the end, with the April 13 deadline fast approaching, a final draft, radically different from previous drafts considered at public hearings, was pasted together and sent to Congress with no hearings or any other form of public comment.

A NACDL liaison committee to the U.S. Sentencing Commission, chaired by our Second Vice President Alan Ellis, has reviewed the guidelines in detail. NACDL's full Board of Directors has voted unanimously to oppose the guidelines in the form submitted to Congress on April 13. It is our view that the guidelines are excessively harsh, deficient in procedural safeguards, unnecessarily and unworkably complex, and will clog the courts with vastly increased litigation and appeals.

I. PROBATION

NACDL believes that the guidelines must make greater use of probation as an indicated sentencing disposition. Specifically, we are opposed to the following aspects of the proposed guidelines: limiting the availability of probation with no incarcerative conditions to cases where the guideline minimum is zero months; the preclusion of any form of probation where the guideline minimum is over six months; mandatory conditions of intermittent or community confinement where the guideline minimum is between zero and six months, even though the only mandatory conditions of probation specified in the statute (18 USC 3563(a)(2)) are fines, restitution and community service; and the limited availability of split sentences. In these aspects, the guidelines clearly reflect the notion that the only real punishment is imprisonment--a notion that is not only empirically unsupportable and pointlessly harsh, but contrary to the legislative mandate as well.

We would suggest that the Commission has not met the authorizing legislation's minimal requirement that the guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 USC 994(j). The preclusion of probation for any and all first offenses for which the guideline minimum is over six months, and the absolute lack of any guidelines or commentary suggesting departures from this preclusion for first-time or non-violent offenders, reflects no serious effort to comply with this vital and central congressional mandate.

What it reflects, instead, is an overriding--and, we believe, completely misplaced--concern with the 25-percent rule set forth in section 994(b). But as section 994(b) itself makes plain, the rule that there can be no more than a six-month or 25 percent deviation between the maximum and minimum terms of imprisonment applies only "[i]f a sentence specified by the guidelines includes a term of imprisonment." Thus, the Commission is free to prescribe by guideline whether and under what circumstances a term of imprisonment need be "specified." And the statutory scheme makes plain that the Congress intended to treat probation and imprisonment as separate and alternate sentencing options, calling for two separate sentencing determinations: first, "a determination whether to impose as sentence to probation . . . or a term of imprisonment" (section 994(a)1)(A)); and second, a determination as to "the appropriate length of a term of probation or a term of imprisonment" (section 994(a)(1)(B)). See Statement of Federal Public and Community Defenders, before House Judiciary Subcommittee on Criminal Justice, July 15, 1987.

Nevertheless, it appears to be the Commission's position that probation and imprisonment are all a part of a single continuum, running from zero or negligible punishment (i.e., probation), through the full range of prison sentences, and that no other express statutory mandate--including the mandate to reduce prison overcrowding (section 994(g)) or to provide non-incarcerative sentences for first-time and non-violent offenders--can be permitted to intrude upon their strained and unsupportable reading of section 994(b).

We would further suggest that the Commission has erred in its evident conclusion that section 994(j) precludes a non-incarcerative sentence for an "otherwise serious offense." The provision is framed to encourage non-incarcerative sentences in certain circumstances, but by no means affirmatively precludes such sentences in other circumstances--as long as the fundamental purposes of sentencing (as set forth in 18 USC 3553(a)(2)) are met. Indeed, section 994(j) makes a particular point of specifying only one type of offense for which imprisonment is "generally inappropriate"--a "crime of violence resulting in serious bodily injury." For the reasons set forth below, it is our position that the use of probation is not inconsistent with sanctioning "serious" offense conduct."

Traditionally, the sentencing judge has been "obliged to view probation as a substitute for the sentence and to formulate conditions calculated to ensure that the probation furthers the purposes of the criminal law." United States v. Mitsubishi International Corp., 677 F.2d 785, 788 (9th Cir. 1982), citing United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979). Especially when coupled with stringent conditions, probation has a deterrent and punitive aspect to it. See, e.g., United States v. Danilow Pastry Co., Inc., 563 F.Supp. 1159, 1167 (S.D.N.Y. 1983); United States v. William Anderson Co., 698 F. 2d 911, 913 (8th Cir. 1982).

In Danilow, the court was face with the need for structuring sentencing options for the corporate defendants. In weighing the effectiveness of a sentence of probation, the court observed:

> [Imposition of] fines substantial enough to achieve the appropriate measure of deterrence would bankrupt the corporate defendants. Such a sentence would cause widespread unemployment among the bakery's employees, damage the economies in which the plants are located and ironically, diminish competition. Hence, this is precisely the overly harsh sentence that the Probation Act was designed to avoid.

563 F.Supp at 1166-67. In explaining its preference for probation under the circumstances, the court added:

> Rehabilitation and specific deterrence against future price fixing by the six corporations is also enhanced in that the executives and workers of these companies will be made aware, on a continuous basis throughout the next twelve months, of the violations perpetrated

> by their company, of the need for restitution, and of the need to guard against similar violations in the future.

Id., at 1167. These arguments are no less compelling in the case of individual defendants.

Compelling testimony of the effectiveness of probation was provided before the House Judiciary Subcommittee on Criminal Justice in July by Judge Thomas Wiseman on behalf of the Federal Judges Association. Judge Wiseman reported that, among the hundreds of offenders he has sentenced since 1981, the recidivism rate has been less than 7 percent, or, as he put it: "This tells me that supervised probation makes good social sense because over 93 percent of these people are rehabilitated."

Finally, as practicing attorneys, we are aware of our clients' perceptions of probation, particularly when applied with special conditions. The United States Probation Office in the Southern District of Florida has instituted a "Special Offender Unit" which supervises high-risk probationers and parolees. The probationers/parolees under the supervision of the Special Offender Unit are subject to intense scrutiny of their financial affairs, employment and other verification, urinalysis, etc. Many of the defendants under the supervision of the Special Offender Unit, confirming the punitive and deterrent aspect of such supervision, have expressed a preference for imprisonment.

NACDL urges that the guidelines be revised to make greater use of probation, probation coupled with intermittent confinement (including home detention and community treatment centers), and split sentences (which, in the wake of the Sentencing Reform Act, must be accomplished by use of supervised release, as the Commission has recognized). It is our view that probation, especially when coupled with stringent conditions, can be a strong and effective sentence, immensely more cost-effective than imprisonment. It can and should be applied to "serious" offenses with due consideration for the character and background of the offender and the statutory purposes of sentencing.

II. SENTENCING ALTERNATIVES

The guidelines reflect a near-total preclusion of non-incarcerative sentencing alternatives, despite the congressional mandate calling for their inclusion (section 994(j); see also section 239 of P.L. 99-473 (Sense of the Senate resolution)), research supporting their effectiveness, and the current successful use of alternatives in many federal and state courts.

In United States v. Murphy, 108 FRD 437 (E.D.N.Y. 1985), Chief Judge Weinstein sentenced a former legal secretary convicted of RICO, mail fraud and obstruction of justice, to a term of home detention, expounding in the process upon the fundamental goals of sentencing:

> Rehabilitation in general takes place more effectively outside prison walls. Federal Probation Officers in this district have resources and skill to exercise strict control, supply training and help with jobs. Cutting the person off from family, friends and jobs during this process is counterproductive.
>
> Specific deterrence is important, but where it does not require incapacitation, particularly among non-professional criminals, it can be accomplished

> without long incarceration. A taste of jail may be enough under such circumstances.
>
> General deterrence is a factor we know very little about. For most crimes of white collar corruption it may not be necessary to provide substantial prison terms. Heavy fines, disgrace and loss of licenses to practice professions will help deter. Most important is vigilance of those who should be apprehending and prosecuting the white collar criminals. Putting our money in swift and sure prosecution rather than in prison terms appears to be cost effective.

108 FRD at 438-439. The Murphy decision also points to the cost effectiveness of this form of sentence, both in terms of dollars and cents, and societal costs. Non-incarcerative punishments prevent the breakup of defendants' families, avoid psychological and physical disruptions that cause trauma, and allow the offender to continue gainful employment.

Research on sentencing indicates that it is the certainty of punishment, rather than its length or severity, which produces the most positive results in the criminal justice system. The bulk of prison sentence length research suggests that the shorter the time served, the greater the likelihood of success in the community once released. See Deterrence: The Legal Threat in Crime Control, (Univ. of Chicago Press, 1979), at 200; United States v. Danilow, supra; "Time Served and Parole Outcomes Among Parole Risk Categories," 5 Journal of Criminal Justice, at 1-12 (1977).

We recognize that probation alone, considered by some as an "alternative," is often not adequate to meet the purposes of punishment. However, we believe that there is an enormous range of intermediate sanctions--real and constructive sentencing options other than mandatory incarceration which could and should be recommended within the guidelines. What follows is a discussion of some of the more widely publicized alternatives.

Community Service

Community service sanctions are gaining widespread acceptance in federal and state courts. As one federal judge has explained:

> . . . the public service sentence is not appropriate for every type of defendant in every type of case. But I do think it should be one of the alternatives considered in every case. In the appropriate case, a public service sentence can be a progressive, productive alternative to jail. It provides the chronically wounded taxpayer with a rare double barrelled break. Hard earned tax dollars are not wasted on housing and feeding the offender, and the offender's public service assignment is something of a dividend to the taxpayer in terms of expanded manpower service.
>
> Moreover, a meaningful, closely supervised public service sentence will provide a daily reminder to the offender that he has in fact committed serious anti-social behavior. It gives the offender an opportunity to pour some water back into the public well--to redeem himself in his own eyes and in the eyes of his fellow man.

Tauro, Joseph L., "Sentencing: A View From the Bench," New England Journal on Criminal and Civil Confinement, 9(2), at 323-30 (1983).

Court programs and criminal justice researchers have over the past 10 years documented quite clearly that community service orders can serve as effective and constructive forms of punishment. According to a report commissioned by the Justice Department:

> Community service orders can serve most of the classical purposes of punishment, as well as offer additional benefits to the public. They are intended to serve as punishment or retribution, because performing service without pay is an imposition on the time and liberty of the offender. And they may serve to deter

> additional crime. The service may well entail experiences that have a positive impact on the offender's attitude or behavior, thereby correcting it. . . . To the extent that community service sentencing operates to mend the wounds in society that result from criminal acts, it may enhance the general welfare and contribute to a more harmonious society.

"Community Service by Offenders," U.S. Department of Justice, National Institute of Corrections, at 10 (1979). And in United States v. Missouri Valley Construction, CR82-L-6 (D.Neb. 1982), the court observed that:

> If the community service features of the sentence are correctly devised they will not have decreased the amount of punishment, but will have increased the usefulness . . . of it.

There are thousands of federal cases involving sentences to community service. Among them: United States v. Alton Box Bd., (1977-1) Trade Cas. (CCH) 61,336, at 7,169 n.9 (price fixers required to provide management assistance to philanthropic services working to help ex-offenders); United States v. Blankenheim, No. CR-74-CBR (N.D. Cal. 1974) (white collar defendants given suspended sentences of 3 to 6 months, $5,000 to $15,000 fines, and required to make 12 oral presentations to business and civic groups concerning the case); and United States v. William Anderson Co., 698 F.2d 911 (8th Cir. 1982) (corporate executives in construction antitrust/bid-rigging cases ordered to complete such community service as working at group homes for juveniles, developing a job program for inmates, working on an Indian reservation, and assisting handicapped people).

House Arrest

Another mid-range correctional sanction, known as house arrest or house detainment, is gaining increased support as a tenable, accountable and cost-effective alternative to incarceration.

House arrest is being used by state courts throughout the country in an effort to find alternatives to traditional incarceration while relieving prison overcrowding. Since 1983, for example, several thousand offenders have been sentenced to house arrest in Florida, leaving their place of "confinement" only to go to their jobs or to perform community service. The program has helped reduce the rate of prison commitments by 180 per month. Alabama has a similar program whereby 800 individuals have lived at home, commuted to their jobs, and paid $10 a week to the state over the past two years. And the former state corrections director for South Carolina, Connecticut, Georgia and Arizona, has stated that "not only was it more economical to use the offender's home as his jail, but the utilization of non-professionals as monitors saved the jurisdiction money. And, in addition, there was the benefit of a stable family environment and support system." Crim.J. Newsletter, February 28, 1983, at 5.

House arrest is also gaining support in federal court. In one case (Shoob, J., N.D.Ga. October 3, 1985), a defendant convicted of several mail fraud and drug charges was sentenced to intensive probation supervision, including house arrest and 16 hours of community service per week for one year. In another

(Johnson, J., D.D.C. November 19, 1985), a defendant convicted of uttering a U.S. Treasury check was sentenced to intensive probation supervision, including house arrest for one year, community service for three years, and monitoring by an outside agency. *See also* *United States v. Murphy*, *supra* (probation and two years house arrest).

Electronic Monitoring

A third alternative, one that complements house arrest, is electornic monitoring, developed in the past five years to provide additional resources for the control of offenders in the community. The equipment is becoming increasingly sophisticated, and falls into two basic categories--passive systems, providing 24-hour verification of geographic location by means of a small, non-removable and tamper-proof transmitter worn by the inmate at all times, and active systems, which rely on randomly generated contacts, and require that the inmate respond to a telephone call or visit. A 1985 study, ("Electronically Monitored Home Confinement") funded by the National Institute of Justice concluded that passive monitoring equipment operated successfully, and, as compared to detention, resulted in "substantial savings" to the criminal justice system.

III. PRISON IMPACT

On June 19, more than two months after the submission of the text of the guidelines to the Congress, the Commission transmitted to Congress a report on the impact on the federal prison population resulting from implementation of the Commission's proposed federal sentencing guidelines, together with various recent legislative enactments affecting sentencing. As a result of the reliance upon drastically lengthier sentences and the virtual elimination of probation, the Commission projects that within 15 years, the federal prison population may rise as high as 165,000. Current population is 43,000, some 56 percent over capacity.

According to our rough figuring, it would cost about $10 billion to build enough new prison space to house the additional 136,000 prisoners (assuming the current $72,000 per bed average cost, with no inflation factored in). The annual operating costs associated with these additional prisoners would be almost $2.5 billion per year (assuming the current average level of approximately $17,000 per prisoner per year). These amounts would be above and beyond the approximately $1 billion per year currently being spent by the Federal Prison System for construction and operation combined.

Where will the money come from? Is it realistic to expect the federal budget to absorb such increases without deviating from mandatory deficit-reduction targets? Are the Commission's numbers realistic, or do they perhaps even understate the problem? (This question remains unanswered, even though the GAO was directed by the Congress in the 1984 Act (in section 235(a)(1)(B)(ii) of P.L. 98-473) to conduct its own study of the guidelines' prison impact by September 10 of this year; due to the shortness of time, the GAO essentially accepted the Commission's prison impact study, concluding that the Commission's methodology appears reasonable, but making no effort to examine the validity of the raw data to which the methodology was applied, or to generate their own data, assumptions, and methodology.)

It is our view that something's got to give. It is unimaginable that a Congress struggling to comply with the Gramm-Rudman targets will fund enough new prisons to keep up with this incarceration obsession. The Congress has never spent more than a couple hundred million dollars in a single year for prison construction. Even last year, when the Congress knew that the stiffer penalties in the Anti-Drug Abuse Act would drastically increase the federal prison population, and the House approved $1 billion for extra prison construction, the Senate literally decimated that amount, to $98 million--enough to add approximately 1,000 new beds--which, incidentally, is the number of new prisoners currently entering the federal prison system every week.

Thus, if the guidelines and current law remain unchanged, the result could be the complete breakdown of the federal prisons and the criminal justice system itself. It will be an open invitation to judges, prosecutors and defense lawyers to join together to create new ways around the strictures of the statutes and the guidelines--for example, through extensive charge bargaining or creative plea agreements--leading to disparities and anarchy that will make pre-1984 sentencing look like cookie-cutter justice. It will also be an invitation, of course, to widespread prison rioting and court-ordered population caps and early releases.

IV. PRACTICAL BURDENS ON THE CRIMINAL JUSTICE SYSTEM

The guidelines will require prosecutors and defense attorneys, including private and court-appointed attorneys, as well as public defenders, to devote significantly more work, time and resources to the plea bargaining and sentencing processes than is presently required. In addition, the workload of judges, probation officers and related court personnel may be expected to rise dramatically.

Plea Agreements

Currently, plea negotiations are usually limited to dismissal of charges, agreements not to bring additional charges, and, sometimes, sentence recommendations. Under the Guidelines, attorneys will have to enter detailed negotiations respecting each category of fact that will affect a sentence. In fact, the Guidelines specifically envision a written stipulation of facts by the parties setting forth the relevant facts and circumstances of the actual offense conduct and offender characteristics, as well as the reasons why the sentencing range resulting from the proposed plea agreement is appropriate. Section 6B1.4.

Plea agreements under the Guidelines will require much more time to prepare and will be far more detailed since they will have to contain numerous provisions covering all of the categories which are relevant to the offense conduct, offender characteristics and proposed sentencing range, such as, Victim-Related Adjustments, Section 3A1.1-.3; Role in the Offense, Section 3B1.1-.4; Adequacy of Criminal History Category, Section 4A1.3; and Departures, Section 5K2.1-.14. Obviously, attorneys will have to spend a substantial amount of time in negotiating, drafting and amending plea agreements to include all of the relevant factors included in these categories. Moreover, under Section 6B1.4(d), the court can reject the stipulation and determine the relevant facts with the aid of the presentence report. Therefore, where the court rejects the stipulation and proposed sentencing range after a review of the presentence report, the case is likely to go to trial and the time and effort expended by the attorneys in negotiating a plea will be wasted.

Sentencing Procedures

Sentencing under the Guidelines will require time-consuming calculations on numerous issues by attorneys, probation officers and judges and will probably result in numerous sentencing delays. Moreover, the procedures enunciated for the resolution of factual disputes by the sentencing court will create the need for increased litigation prior to the actual sentencing.

Since the defendant cannot waive the preparation of a presentence report under the Guidelines (Section 6A1.1), virtually all sentencing will require the preparation of a presentence report. Although Section 6A1.1(b) states that the presentence report shall be disclosed to the parties at least ten days prior to the sentencing date (unless waived by the defendant), this time period will prove to be insufficient for counsel to review the presentence report and to file a written statement of the sentencing factors to be relied upon or a written statement adopting the findings of the presentence report (with or without certain exceptions or additions) or a written stipulation agreeing to adopt the findings of this presentence report (subject to exceptions or additions). Section 6A1.2. In addition, the Guidelines require that the court resolve disputed sentencing factors and notify the parties of its tentative findings well before the imposition of sentence. Section 6A1.3(b). Therefore, the ten-day minimum period appears to be unrealistic and presentence reports will either have to be prepared much more quickly, which is highly unlikely, or sentencing dates will have to be continued, perhaps several times, in most cases.

Defense attorneys and prosecutors will have to devote substantial time to the preparation of the written statement of factors to be relied upon at sentencing or an alternative statement or stipulation as set forth in Section 6A1.2(c). The preparation of these statements by counsel will entail numerous time-consuming calculations on issues relating to the "facts and circumstances of the actual offense conduct and offender characteristics." Section 6A1.2(e)(1). Furthermore, although the Guidelines do not set forth the manner in which disputes must be resolved other than to state "in accordance with Rule 32(a)(1), Fed. Rule Crim. Procedure (effective November 1, 1987)", it is likely that courts will have to hold evidentiary hearings in order to resolve factual disputes. In fact, the Commentary to Section 6A1.3 states that "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues." Since so many more factual findings which will directly influence the sentence to be imposed are required under the Guidelines, there will often be disputed issues of fact, resulting in more frequent and lengthier pre-sentencing evidentiary hearings. Defense attorneys and prosecutors will be forced to devote significant time and resources to this aspect of the sentencing process in order to effectively represent their clients at such evidentiary hearings. After the court notifies the parties of its tentative findings on the disputed factual issues, the attorneys will then have the opportunity to submit oral or written objectives before imposition of sentence. Section 6A1.3(b). Thus, these sentencing procedures require the submission of detailed written statements and objections and numerous evidentiary hearings. It is apparent that these procedures will require much more attorney time, work and resources than is presently required under the existing sentencing system. In fact, it is accurate to state that the Guidelines, by emphasizing specific factual findings and diminishing the availability of probation as an available sentence, will fundamentally alter the role and responsibility of the defense attorney in the sentencing process. Instead of devoting most of his/her time to the preparation of a comprehensive sentencing alternative, defense counsel will have to expend most of his/her time and resources on the resolution of disputed sentencing factors.

Court Workload; Procedural Due Process

Section 6A1.3 discusses resolution of disputed factors relevant to the sentencing decisions. Presently, the court resolves these disputes pursuant to Fed.R.Crim.P. 32, and 6A1.3 of the guidelines mandates that this procedure shall continue to be followed through the use of tentative findings by the court and written objections by the parties before the imposition of sentence. Sentences above or below the guideline range will require a hearing. Indeed, it appears that the sentencing process under the guidelines may routinely involve two hearings before the sentencing judge: one which results in tentative findings to be followed up by counsels' written objections, and a second one for permanent findings and imposition of sentence. Gone are the days of squeezing the sentencing procedure into a fifteen minute recess of a major civil case. Despite the Commission's statement, in the commentary following 6A1.3, that "lengthy sentencing hearings should seldom be necessary," we anticipate that each sentencing will occupy seceral hours of "on the record" time, and a like amount in chambers preparing tentative and permanent findings.

The guidelines will also lead to more appeals of sentences, which are presently almost nonexistent. Since either party can appeal a sentence even if it falls within the guideline range (section 1A2), it is likely that the guidelines will result in appeals in virtually every case in which one party is unsatisfied with the sentence. And as Judge McKinnon wrote, as a Sentencing Commissioner responding to Commissioner Robinson's dissent, the Courts of Appeal are expected to assume an important role in smoothing out the sentencing disparities and other problems raised in the dissent.

Finally, by making sentencing dependent upon explicit findings of fact, if factual accuracy is not assured through appropriate evidentiary hearings and other due process guarantees, defense attorneys will no doubt devote their energies to post-conviction attacks on the procedures to be used to calculate sentences. See United States v. Reich, 41 Cr.L.2198, 2190 (S.D.N.Y. May 20, 1987).

Let me be clear on one point: there are some who would say that the problem of the guidelines inviting a litigation and appeals explosion can easily be cured by stripping away the minimal procedural protections already contained in the guidelines--the same people, perhaps, who advocate stripping away the exclusionary rule and Miranda warnings in order to make law enforcement efforts more "effective." To the contrary, the problem with the guidelines is not too many rights, but too much complexity. The guidelines must be revised to reduce the incentive to litigate every peripheral fact issue and to appeal, by reducing their complexity and rigidity, and the specificity of the numerical values and calculations required.

To be sure, the Commission has come a long way, since its preliminary draft in October of 1986, in attempting to ensure appropriate procedural protections for offenders sentenced under the guidelines, and deserves to be commended for its efforts in this regard. But the end product still falls far short of providing adequate protections, particularly in its failure to impose any meaningful controls over the use of unadjudicated misconduct in sentencing determinations. In this area, we endorse fully the statement of the Federal Defenders before this Subcommittee last week, on July 15, as set forth in the entirety of Part III, "Procedural Due Process in Guideline Sentencing."

Routine Cases

In addition to the areas of plea agreements and sentencing procedures, the Guidelines will require attorneys to devote more time to other aspects of the sentencing phase. For example, in some districts there are certain misdemeanors and petty offenses which are handled expeditiously through the entry of a guilty plea and immediate sentencing at the defendant's first court appearance. In some districts, a charge of illegal entry, under Title 8, United States Code, Section 1325, may be handled in this way with a guilty plea before a magistrate or judge, immediate sentencing to time served or a suspended service and transfer of the defendant to the Immigration and Naturalization Service for immediate deportation. Since the defendant cannot waive a presentence report under the Guidelines, and since the plea agreement and sentencing procedures are so complex and time-consuming, it is unlikely that such expeditious dispositions will be possible. Instead, attorneys will have to devote more time and work to the resolution of these relatively simple cases.

V. LEGAL OBSTACLES TO IMPLEMENTATION OF THE GUIDELINES

Any sentencing decisions made pursuant to the guidelines would be subject to to legal attack to the extent that the Commission failed to comply with its statutory mandate in formulating and transmitting its recommendations. Among the potential problem areas are the following:

Failure to Minimize Prison Overcrowding

The Sentencing Reform Act mandates that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." The Commission has made no effort whatsoever to comply with this mandate--a fact recently admitted, even flaunted, by various commissioners in public statements. As Judge William Wilkins, the Commission's Chairman, told the Senate Governmental Affairs Committee on July 21: "We never made a decision based on what we thought would be the impact on prison population." He offhandedly dismissed prison capacity considerations as an "artificial limitation" on the Commission's work.

In accordance with this attitude--that it is the Commission's job to set incarceration policy, and the Congress's job to pay for it--the Commission undertook its prison impact analysis only as an afterthought to the guidelines. The Commission did not complete its prison impact work until June 18, more than two months after the guidelines had been submitted to the Congress.

Arguably, the fact that the Commissioners had no approved prison population projections before them at any time during the consideration of the guidelines might not in itself have prevented them from formulating the guidelines to minimize overcrowding, had they made a conscientious effort, for example, to keep overall person/years of incarceration at or below current levels. But as noted above, any notion that overcrowding should be considered as a factor in formulating the guidelines was purposefully and resoundingly rejected. As a result, the extent of the Commission's noncompliance with the mandate of section 994(g) is enormous.

It should be noted that section 994(g) is not designed simply to prevent prison overcrowding from getting any worse than it already is--and it is currently "simply intolerable" (in the words of Bureau of Prisons Director Norman Carlson), at 56 percent over capacity system-wide. On the contrary, the mandate is to minimize the likelihood that population will exceed capacity at all--that is, the goal is zero percent overcrowding.

By the Commission's own estimates, however, the guidelines, together with recent federal criminal legislation could cause a tripling of the federal prison population within ten years, and a quadrupling within fifteen. As mentioned earlier, that means a federal prison population of 165,000 in the year 2002--compared with a current rated capacity of 29,000 for the entire federal prison system. Even if the Congress appropriates every dollar necessary to build every prison construction project in the Justice Department's current plans for the next five years (as set forth in the FY 1988 budget submission to Congress), prison capacity will rise to just over 44,000, while the Commission calculates that population could rise to 83,000 during the same time period--an overcrowding rate approaching 100 percent by 1992.

Failure to Provide Non-incarcerative Alternatives

As discussed in Part I, above, the guidelines' failure to provide for a nonincarcerative sentence for first offenders and offenders convicted of non-violent or non-serious crimes constitutes a violation of 28 USC 994(j). Sentences to imprisonment imposed upon such offenders under the guidelines will be subject to challenge.

Use of Fines to Pay for Prison Costs

The Commission has made an attempt to minimize the budgetary costs of any increase in federal prison population, by providing, in section 5E4.2(i) (dealing with determining the amount of a fine) that "subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered."

Implementation of this provision, however, would be subject to challenge on the basis that the money collected in fines cannot lawfully be spent to offset the cost of imprisonment, as apparently assumed by the Commission. Another provision of the Comprehensive Crime Control Act mandates that "all fines that are collected from persons convicted of offenses against the United States [except those otherwise already dedicated by law to a different purpose] shall be deposited in the [Crime Victims] Fund" rather than the general fund of the Treasury. 42 USC 10601 (a),(b). (This restriction on the deposit of fine monies is subject to a $110 million cap in any particular fiscal year, and to a sunset provision. Id., (c).) The expenditure of amounts in the Crime Victims Fund is limited to programs under the Victims of Crime Act. Id., (d). Thus, while fine amounts may perhaps lawfully be calculated as set forth in guideline section 5E4.2(f) (but quaere whether the calculation of a fine in this way, when it cannot be spent in this way, is so irrational as to violate due process), they cannot actually be so used without amending the Victims of Crime Act and thereby short-changing the victims whom Congress intended to aid in a separate, politically popular and important provision of the CCCA.

Additionally, there are severe practical limitations on the utility of subsection (i) as a revenue-raising devise for the Federal Prison System. The reference to "subsection (f) herein" means that a fine may be reduced or waived where the defendant is unable to pay or imposition of the fine "would unduly burden the defendant's dependents." Given the significant fine amounts otherwise imposable under the table set forth at section 5E4.2(c), the addition of a fine of more than $17,000 per year of incarceration, as called for by subsection (i), will result in extremely large presumptive fines. Given the financial circumstances of most federal defendants, subsection (f) waivers may be expected to be the rule rather than the exception.

Effective Date Problems

Section 235(a)(1)(B)(ii)(II) of the Sentencing Reform Act provides that the guidelines shall not take effect until three things have occurred: first, the guidelines have been submitted to Congress "along with a report stating the reasons for the Commission's recommendations;" second, the GAO has undertaken a "study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system;" and third, the Congress has had six months in which to examine the guidelines and consider the reports submitted.

As noted earlier, what the Commission transmitted to Congress on April 13 was its guidelines and policy statements. No report was sent up until more than two months later, on June 19. The submission of such a report and six months for the Congress to consider it being preconditions to the guidelines taking effect, it does not appear that the guidelines can take effect, as a matter of law, any earlier than December 19, 1987.

But perhaps more problematic is the GAO's failure to conduct the guideline-impact study required by section 235(a)(1)(B)(ii)(II) of P.L. 98-473, as mentioned in Part III above. It is our view that the lack of an original GAO study will serve as a continuing bar to the implementation of the guidelines.

VI. DELAYING IMPLEMENTATION

As an alternative to outright rejection of the guidelines. NACDL urges that, at the very least, their implementation must be postponed significantly, to permit further review of their many potential problems, and a period of field testing in federal criminal cases.

The Commission itself has recommended a nine-month delay in the implementation of the guidelines, for purposes of field testing, as well as training of judges, attorneys and probation officers. There is room for concern, however, (as observed by the Attorney General in a speech on the guidelines on May 22) that the election-related distractions surrounding an August 1988 deadline would preclude thoughtful and thorough review by Congress. Since the Commission recognizes that the guidelines simply are not ready for implementation any earlier than that, the time should be extended beyond the elections, including a period of no less than six months (the congressional study period incorporated in the Sentencing Reform Act) after the convening of the 101st Congress to permit review of the guidelines themselves, the field test results, and a full GAO report on prison impact. This would mean an effective date no earlier than June 1, 1989.

Testimony on the Proposed Delay in the Federal Sentencing Guidelines

Marc Miller

Special Counsel
Vera Institute of Justice
New York

The proposed delay in implementation of the federal sentencing guidelines promulgated by the United States Sentencing Commission offers a real opportunity to improve the encouraging but flawed product of the Commission. This testimony notes the strong reasons for delay and suggests what can be achieved during that period.

It is helpful to place the April draft of the Guidelines in some historical perspective. In 1984, after a dozen years of unsuccessful proposals, Congress created the Commission to design a rational sentencing scheme for federal offenders. Proponents of federal guidelines desired a fair, consistent, principled "truth-in-sentencing" system that would accomplish the purposes of sentencing justly and effectively within the planned capacities of federal probation and prison systems. The Commission was expected to follow on the bold path taken by sentencing commissions in Minnesota and Washington (but followed less successfully in New York and other states).

Advocates of federal guidelines underestimated the difficulty of producing a sound sentencing structure out of the morass of federal criminal law. Rather than dealing with the few hundred offenses common under state law, the Commission had less than a year to bring principle, purpose, and proportionality to sentencing under more than one thousand separate federal criminal statutes proscribing a vast assortment of behavior. Simply reconciling some of the statutes, passed in different eras and for very different reasons, posed a formidable challenge.

The April Guidelines are essentially unrelated to earlier drafts released by the Commission (which received heavy criticism from commentators, judges, legislators, academics, and those who work in the federal criminal justice system). One Commissioner has acknowledged drafting the April Guidelines in the five weeks before submission. Thus, there was none of the review and public comment contemplated by Congress when they chose to use the commission process, and in the end, the April Guidelines submitted to Congress received less feedback than Congress obtains when it drafts important legislation. Because of this history, it was left to Congress itself to explore the Guidelines' strengths and weaknesses. The judiciary committees of both houses have validated the commission process (and confounded its critics) by using the report and wait period to conduct such a thoughtful review.

What can be accomplished by delay? After a disorganized and controversial first year, the Commission itself should lead the reform effort. The Commission's own call for delay suggests that they have the willingness and the capacity to improve their work.

Eight substantial tasks face the Commission:

(1) The Commissioners may have looked at sentences, but they never looked at sentencing. The Commission should seek extensive comment from federal trial judges, and experiment with the Guidelines in actual court settings. Federal district court judges, including many who support the idea of guidelines, have had enormous difficulty in trying to apply the proposed guidelines to actual cases. See United States v. Reich, 86 Cr. 0863 (S.D.N.Y. May 20, 1987) (Sweet, J.). Judges offer an enormous untapped reservoir of experience and wisdom about sentencing.

(2) The Commission should state the sentencing principles that control the Guidelines. The Commission's commentary acknowledges that the current Guidelines lack any description of preferred (or even desirable) sentencing principles. The Commission claims that they modeled the Guidelines on average current federal sentencing practices, but even under this mechanistic approach courts need sentencing principles to apply and interpret the Guidelines.

(3) The Commission should simplify the extraordinarily complex Guidelines. The current Guidelines include a sentencing grid with 258 sentencing "boxes" (43 offense severity levels and 6 criminal history categories). This compares with 70 "boxes" in the Minnesota grid. The complexity of the Commission's Guidelines is needless and harmful. Experience indicates that complex guidelines result in frequent errors. Washington State rejected a proposed 27-level guideline matrix because its severity gradings were too fractured to be credible. The Commission should explore existing knowledge on "what works" for sentencing guidelines. The range of federal offenses might

be better broken down into several separate categories, and a sentencing grid set out for each category. The byzantine structure of these Guidelines will only generate litigation opportunities and lead to avoidance of the Guidelines by participants in the federal criminal process.

(4) The Commission should confront the critical and costly issue of federal prison impact as Congress directed in the original legislation. The Commission's first cut at an "impact statement," conducted after the Guidelines were submitted to Congress, concludes that under a "low-growth" scenario federal prison population will almost double in the next 5 years from the current level of approximately 42,000 inmates to 72,000. The impact report foresees an increase to 92,000 in ten years, and to 105,000 in fifteen years. Of course, the impact of the Guidelines cannot be fully examined until the Commission explains its methodology and assumptions. These have been promised in a still-to-be-released, who-knows-when Technical Report.

The Commission and others place the responsibility for the bulk of this increase on Congress (see N.Y. Times, 9/25/87). But the real questions raised by the impact statement do not concern the portion of the impact attributable to the choices of the Commissioners as distinguished from the choices of Congress, but rather they turn on the fundamental issues of the Commission's role in dealing with prison resources and in establishing a comprehensive federal sentencing policy. Congress expressly placed the obligation of setting federal prison policy on the Commission and directed the Commission to formulate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." The Commission needs to confront the underlying causes of the explosive and unaffordable prison impact, such as the problems raised by mandatory sentences, as part of the process of reforming the Guidelines. The Commission should recommend to Congress whatever statutory reforms would, in the Commission's judgment, produce just and effective sentences without requiring a tripling of prison capacity or a massive release program in a few years.

(5) The Commission should carefully consider the role of probation, and of probation officers, in the new system. The Guidelines, which ostensibly mirror current practice, in fact drastically reduce the role of federal probation without explanation.

(6) The Commission should allow room for the development of alternatives to incarceration such as means-based fines (so-called "day fines"), intensive supervision with home confinement, and community service sentences. Intermediate sanctions are widely seen as the most important development in sentencing across the United States, and the most appealing solution to the prison over-crowding crisis. Under any theory, prison should be used only when other forms of punishment or achieving control over offenders are inadequate to serve the purposes of sentencing. Congress endorsed the broad use of non-custodial sanctions, particularly for first offenders, in the authorizing legislation. The Commsion should reconsider the untenable position that non-incarcerative sentences are equivalent to serving no time at all.

(7) The Commission should examine the role of plea bargaining in the federal system since the great majority of federal charges are currently resolved through pleas. The current draft sidesteps the issue of bargaining, and may in fact encourage new forms of bargaining. Eliminating "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" emerged as a primary stated goal of Congress in pursuing guidelines. Most federal cases are resolved through plea bargaining, and the Commission has stated that it expects this practice to persist. Because plea bargains are not controlled, the Guidelines may not achieve the basic goal of disparity reduction.

(8) The Commission should reconsider its strong encouragement of departures from the Guidelines by judges in individual cases, and the toothless standard of review provided to the Courts of Appeal. The standards for departure are in some ways lower then the standards for correct application of the Guidelines. Congress wanted to create a system with limited departures from guidelines based only upon reasons not addressed by the Commission. These Guidelines encourage judicial departures whether or not the basis for departure is a factor already listed in the Guidelines. Congress provided in the authorizing legislation that "[t]he court shall impose a sentence [in the guidelines range] unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." The current Guidelines, in contrast, acknowledge in the departure policy that they fail adequately to take any circumstance into account.

These points all concern the actual operation and impact of the Guidelines. They can all be successfully addressed during a reasonable period of delay. I have not discussed the constitutional status of the Commission, or the need for a full-time commission precisely because they are not points that can be resolved by the Commission during a period of delay. But my own view is that the Commission is, at best, on a weak constitutional foundation, and probably violates the separation of powers. In addition, the vast scope of powers given to the Commission year after year may violate constitutional limitations on the delegation of powers regardless of the branch of government to which the Commission belongs. I also believe that a part-time Commission could function at least as well as the current full-time commission.

There are also several problems with implementation that have been caused by Congressional oversight, and must be faced by Congress. Under a Supreme Court case from last term, the Guidelines can only be applied to sentences based on crimes occurring after November 1. Thus, there will be a large body of cases after November 1 which must still be sentenced under the old law. This creates a major paradox, however, since the authorizing statute eliminates the very mechanisms that control prior federal criminal sentences -- parole, good time, and sentence modifications. Under the authorizing statute, appellate review will exist only for Guidelines sentences. Thus, sentences issued after November 1 for crimes committed before that date will exist in a no-man's land -- without the benefit of either the prior mechansims of sentence control or the appellate review and other provisions of the new system. This paradox must be resolved by Congress.

Finally, federal judicial resources may be overwhelmed by the combination of these technical problems, the evident constitutional concerns, open-ended appellate review of all Guidelines sentences, and the multiple, poorly articulated factual determinations required by the Guidelines. Federal trial and appellate judges have responded to this threat to judicial resources by voicing universal support for testing and review. This problem, too, can be solved by Congress alone.

It seems to me that the reasons for a delay at this point are many, and the reasons for rushing into effect problematic guidelines are few. The reasons for some delay seem clear and full of common sense: it is not to derail the process of guidelines, but to insure the best implementation of the best guidelines that can be produced. The question is not whether there will be guidelines, but when, and whether they will be an embarrassment to those who conceived and created them. This is not, it seems to me, an issue of the left or the right.

A reasonable delay -- ideally 18 months, but 12 months or even 9 would suffice -- would allow for real consideration of issues not addressed, extensive simulation efforts, thorough training, and necessary reform. The Commission should learn from this process and submit new guidelines to Congress at the end of the delay period.

The dangers from not delaying Guidelines implementation are equally clear. A troubled system, non-responsive to the directions given by Congress in the original legislation, would become ingrained in the federal criminal system. Only a real opponent of all guidelines would support the immediate implementation of these guidelines on the hope that they will be either ignored by judges, manipulated to have little effect in some cases, or be so unsuccessful that they will be overwhelmingly rejected a few years hence. Public policy should not be sought through planned failure.

Sentencing guidelines still offer the best hope of fair and consistent federal criminal sentencing, but first the extension must be enacted into law. Then the real challenge of reforming and rationalizing the Guidelines will begin.

Marc Miller

Marc Miller
Special Counsel
Vera Institute of Justice